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-340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 72-340

PAUL F. CANTWELL, ET AL,
Petitioners,

vs.

BOARD OF TRUSTEES FOR UTILITIES and BOARD OF DIRECTORS FOR UTILITIES OF ITS DEPARTMENT OF PUBLIC UTILITIES OF THE CITY OF INDIANAPOLIS, IN THE NAME OF THE CITY OF INDIANAPOLIS, A MUNICIPAL CORPORATION OF THE STATE OF INDIANA, DOING BUSINESS AS CITIZENS GAS & COKE UTILITY, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX

Robert V. Bridwell
322 Circle Tower
5 East Market Street
Indianapolis, Indiana 46204

Paul Hirsch
3602 North Meridian Street
Indianapolis, Indiana 46208
Attorneys for Petitioners

John F. Neff
1430 Circle Tower
5 East Market Street
Indianapolis, Indiana 46204
Of Counsel

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NAME OF THE CITY OF INDIANAPOLIS, A
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GAS & COKE UTILITY, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND APPENDIX

Petitioners, Paul F. Cantwell, William R. Phillips, Mrs. Robert F. Wagner, Hubert Hester and alter Brown, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 30, 1972, affirming the order and judgment of the United States District Court for the Southern District of Indiana, Cale J. Holder, Judge, entered on April 16, 1971, dismissing the petitioners'

supplemental complaint, and that on hearing the order of dismissal be reversed.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. (Appendix pages A-1 through A-21) The opinion of the District Court dismissing the petitioners' supplemental complaint was not reported in the Federal Supplement; however, the Court of Appeals adopted the opinion of the District Court in its entirety and the opinion is set forth in the opinion of the Court of Appeals. (Appendix pages A-1 through A-21)

JURISDICTION

The judgment of the Court of appeals was entered on May 30, 1972. This Court has jurisdiction under 28 U.S.C.A. Section 1254(1).

QUESTIONS PRESENTED

1. Whether Indiana Code 1971, 19-3-24-1, violates the guarantee of a republican form of government under Section 4, article IV, of the Constitution of the United States by providing for self-appointed board of trustees of the Department of Utilities of the City of Indianapolis.

2. Whether Indiana Code 1971, 19-3-24-1, denies the equal protection guaranteed by the Fourteenth Amendment by excluding the electors of the City of Indianapolis from either directly or indirectly, through an elected official, selecting the persons to be appointed to the

Board of Trustees of the Department of Public Utilities.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved here are Section 4, Article IV, and the Equal Protection clause of the Fourteenth Amendment both of which are set out in the Appendix at page A-22.

The provisions of the Indiana statute involved here is Indiana Code 1971, 19-3-24-1, which is set out in the Appendix at pages A-22 through A-25, and the particular provision questioned is found at page A-24.

STATEMENT OF CASE

The Petitioners brought this action against the Respondents in a two-count complaint seeking in Count I thereof a declaratory judgment as to the constitutionality of Indiana Code 1971, 19-3-24-1, under Section 4, Article IV of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

Count II of the supplemental complaint realleged the allegation of Count I and sought injunctive relief in enjoining the Board of Trustees for Utilities and the Board of Directors for Utilities from further proceedings as such boards.

The theory advanced by the Petitioners as the unconstitutionality of the questioned statute was that because

of the provisions of the questioned statute that provided that at the expiration of the terms of the members of the Board of Trustees for Utilities of the Department of Public Utilities of the City of Indianapolis the Board of Trustees shall nominate the successors thereof to membership on the Board and that each of the nominees shall be appointed by the Mayor of the city within ten (10) days after the Mayor has received such nomination, the citizens of the City of Indianapolis were denied the guarantee of a republican form of government under the Guaranty Clause of the Constitution for the reason that the Petitioners, as electors within the City of Indianapolis, qualified to vote in elections for the Mayor of the City of Indianapolis did not, in fact, have any control either directly or indirectly over the appointment of the persons administering the department of the government of the City of Indianapolis.

The second theory on which the Petitioners sought to attack the questioned statute was that due to the isolation of the Board of Trustees for Utilities from control by a duly elected Mayor of the City of Indianapolis through the power of appointment, the Petitioners were denied the equal protection guaranteed under the Equal Protection Clause of the Fourteenth Amendment in that their vote for the Mayor of the City of Indianapolis has no weight at all in the matter of the selection of the persons to be appointed to the Board of Trustees.

The Petitioners brought the action as registered voters residing in the City of Indianapolis and as customers of the Department of Utilities for the City of Indianapolis seeking to represent a class of persons similarly situated.

The Respondents filed motions to dismiss based on the following reasons:

1. The District Court lacked jurisdiction of the subject matter.

2. Plaintiffs were not the real parties in interest under Rule 17(a), Rules of Civil Procedure.

3. The complaint failed to state a claim against Defendants on which relief could be granted.

The District Court in its Entry for the 16th day of April, 1971, sustained the motions to dismiss for the reason that the supplemental complaint failed to state a claim upon which relief could be granted.

The District Court, in its Entry of April 16, 1971, ruled against the Respondents' motions for dismissal on the grounds that Plaintiffs are not the real parties in interest pursuant to Rule 17(a) of the Federal Rules of Civil Procedure. The District Court also ruled against the Respondents' motions to dismiss on the grounds that the Court lacked subject matter jurisdiction over the complaint. Therefore, the matter before the Court of Appeals on appeal was that portion of the entry below

which sustained the motions to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted.

REASONS FOR GRANTING THE WRIT

The District Court was in error in sustaining the Defendants' motions to dismiss on the premise that a challenge to a state statute on the ground that it is inconsistent with the Guaranty Clause presents no justiciable question. It is only when the questions raised under the Guaranty Clause are not subject to judicially manageable standards that the Guaranty Clause presents no justiciable question. The statute challenged by the Petitioners clearly presents a question of judicially manageable standards in that the manner of the appointment of the Board of Trustees for Utilities by self-perpetuation under the terms of the statute removes the process of appointment from any person or authority which might be directly or indirectly responsible to the electors in the utility district. The authorities relied upon by the Court in its ruling involved questions as to the degree or form of republican form of government and did not involve the situation that exists in this case in which the republican form of government is completely absent.

The District Court erroneously sustained the motion to dismiss on the grounds that the challenged statute did

not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Equal Protection Clause has been held to extend to the rights of electors to have their votes counted and bear weight equally in the administration of government. Under the challenged statute the electors in voting for the Mayor of the City of Indianapolis are deprived of any effectiveness in the exercise of their franchise so far as the appointment of members of the Board of Trustees for Utilities is concerned for the reason that the Mayor himself is excluded from any exercise of choice or discretion in making the appointments under the mandatory terms of the statute.

Section 4, Article IV, of the Constitution of the United States provides as follows:

> "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

That specific portion of the statute which the Petitioners seek to have declared unconstitutional is to be found at page A-22 through A-25 of the Appendix and is that clause of Indiana Code 1971, 19-3-24-1, which

regulates the nomination of the successors to the Board of Trustees of Utilities for the City of Indianapolis. The language provides very clearly that at the expiration of the respective terms of each member of the Board of Trustees the Board of Trustees shall nominate a successor to membership on the Board and that that nominee shall (emphasis added) be appointed by the Mayor of the City of Indianapolis within ten (10) days after receiving the nominations. No discretion is permitted to the Mayor of the City of Indianapolis in selecting the members of the Board of Trustees such discretion being vested solely in the Board of Trustees.

The Board of Trustees in turn appoint a seven member Board of Directors for Utilities which Board of Directors has the power of government, management, regulation, control and operation of the Department of Utilities. Indiana Code 1971, 19-3-24-1.

Petitioners contend that this manner of selecting the Board of Trustees contravenes the guarantee of a republican form of government under Section 4, Article IV, of the United States Constitution.

The first question that might be posed is what constitutes a republican form of government. It appears from the cases presented to the Supreme Court since Luther v. Borden, 49 U.S. (7 How.) 1 (1849) that a great number of

"forms" of government have been presented to the Supreme Court for review under the Guaranty Clause of Section 4, Article IV, of the United States Constitution; and, following the holding in Luther v. Borden, Supra, the Supreme Court has declined to decide the question presented in each case on the ground that the Guaranty Clause is not a repository of judicially manageable standards.

Although the Supreme Court has been reluctant to invoke the Guaranty Clause, it has on occasion taken the opportunity to engage in discourse upon the question.

In the case of In re Duncan, 139 U.S. 449, 461, 11 S. Ct. 573, 35 L. Ed. 219 (1890), the Supreme Court had this to say in discussing the republican form of governmen

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments National

and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulse of mere majorities."

One of the authors of The Federalist, James Madison, had this to say about a republican form of government in The Federalist No. 39:

"If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by

either or the tenures just specified; otherwise every government in the United States, as well as any other popular government that has been or can be well organized or well executed, will be degraded from the republican character."

The Federalist, No. 43, Page 281 (Modern Library 1937).

In The Federalist No. 44, Madison discusses the Guaranty Clause and the meaning of the Guaranty:

"But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

The Federalist, No. 44, Page 284 (Modern Library 1937).

The Court of Appeals in its entry for May 30, 1972, discussed the challenge to the statute under the Guaranty Clause and discoursed upon its determination that the challenge

presented no justiciable question in that portion of the opinion which appears on pages A-15 through A-19 of the Appendix. There the Court of Appeals discusses the ruling in Baker v. Carr, 369 U.S. 186, 262 (1962) which determined that the only significance that Luther v. Borden, Supra, could have for the immediate purposes of the Court was the holding that the Guaranty Clause was not a repository of judicially manageable standards which a Court could utilize in order to adjudge a state's lawful government. The Supreme Court then moved on in Baker v. Carr to determine that a justiciable question was presented under the Fourteenth Amendment of the United States Constitution as it applied to legislative apportionment.

At page A-16 of the Appendix the Court of Appeals cited several cases in which the Supreme Court had consistently refused to resort to the Guaranty Clause. In Taylor & Marshall v. Beckam (No. 1, 178 U.S. 548 (1900), the question tendered involved the contest of an election for the offices of governor and lieutenant governor in the State of Kentucky which had been submitted to the General Assembly of the State of Kentucky. Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912) attempted to question an initiation and referendum clause in the Oregon Constitution on the theory that such direct control by the people of the state constituted a pure democracy as distinguished from a republic. Kiernan v. Portland, 223 U.S. 151 (1912), involved

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an attack on an Oregon statute providing for ordinances by municipalities to carry into effect initiative and referendum provisions of the Oregon Constitution. Marshall v. Dye, 231 U.S. 250 (1913) concerned an attack on an Indiana statute which attempted to submit a new constitution to the electors of the state contrary to the provisions of the Indiana Constitution concerning amendments. O'Neill v. Leamer, 239 U.S. [illegible] (1915), was an attack on a Nebraska statute providing, among other things, for the election of a board of supervisors by the owners of land within the district. Ohio ex rel Davis v. Hildebrant, 241 U.S. 565 (1916), was an attack on an amendment to the Ohio Constitution permitting the initiation and referendum of laws by the electors in the state of Ohio. Mountain Timber Co. v. Washington, 243 U.S. 219 (1917), attacked the implementation of a Washington statute for a workmen's compensation law in that state. Ohio ex rel Clarke v. Akron Metropolitan Park District, 81 U.S. 714 (1920), attacked an Ohio statute concerning the creation and government of park districts on petition to a probate judge. Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937), was an attack on a Virginia statute providing for a milk commission with powers to establish marketing districts and govern the marketing of milk in those districts.

In none of the cases above was the question ever raised as to the complete absence of some control either directly or indirectly by the electors in the particular "form" of government being attacked. In the present case, the language

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of the challenged statute clearly precludes any voice directly or indirectly by the electors in the selection of the members of the Board of Trustees for Utilities in the City of Indianapolis.

Petitioners content that a justiciable question can exist under Section 4, of Article IV of the Constitution of the United States when the question is the non-existence of a republican form of government as opposed to the choice between two republican forms of government such as was presented to the Supreme Court in Luther v. Borden, Supra, where the Court was asked to choose between the government of Rhode Island founded on a royal charter existing at the time Rhode Island was admitted to the Union, and the government established under a constitutional convention called in 1841.

In the case of Kohler et al v. A. P. Tugwell et al, 393 U. S. 531 (1969), the Supreme Court, in a memorandum decision, did Per Curiam affirm the decision of a lower court found at 292 F. Supp. 978. (U.S.D.C. La. 1968). In Kohler v. Tugwell, Supra, the concurring opinion of Wisdon, Circuit Judge, Boyle District Judge joining, discusses the occasions on which a justiciable question might be presented under the Guaranty Clause. The opinion advanced the proposition that the standards which the court found to be judicially manageably under the Equal Protection Clause of the Fourteenth Amendment would be applicable also in determing whether or not the people were deprived of the fundamental rights

inherent in a republican form of government. The judge then concluded the opinion with the following observation on the future of the Guaranty Clause:

"The line of judicial development of the republican guarantee, bent and broken since Luther v. Borden, is not beyond repair. Some day, in certain circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause. Federal courts should be loath to read out of the Constitution as judicially nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism. James Madison best stated the case for Article IV, Section 4. He regarded it as the basis for the doctrine of federal interposition:

> 'It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States,

by the agitation of enterprising leaders, or by the intrigues and influence of foreign powers?' (Emphasis added.)" (Footnotes omitted)

A statement in Baker v. Carr, supra, to the effect that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize in order to determine whether a state government was republican in character, was explained in Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) as follows:

"Petitioners ... contend that congressional approval of such schemes, despite their disparities from population-based representation, indicates that such representation is politically sufficient to establish a 'republican form of government'. As we stated in Luther v. Borden, ... questions political under the Guaranty Clause are not justiciable, where 'political' is used as it was in the early decisions of judicially manageable standards."

The fact that we have held that notwithstanding congressional approval of state legislative apportionment at the time of admission into the Union which deviates from equal population principles, the Equal Protection Clause does not require strict compliance with the equal population principle in legislative apportionment.

Appellees attempt to distinguish the challenged statute from the statutes of the City of Indianapolis

which comprises the utility district, Indiana Code 1971, 19-3-24-6 (the text is to be found in the Appendix at page A-25) to participate in any way in the selection of this particular department of government of the City of Indianapolis. Such a form of government can not possibly be said to be a republican form of government as defined by Madison in The Federalist No. 39, Supra, and as defined by the Supreme Court in In re Duncan, Supra.

In discussing the Guaranty Clause, Madison stated that the only restriction imposed by the Constitution was that an anti-republican form could not be substituted for a republican form. The Federalist No. 44, Supra. Therefore, the question before this court is whether or not under such circumstances, the absence of a republican form of government within a department of the City of Indianapolis gives rise to judicially manageable standards under which the Guaranty Clause guarantees can be invoked. In all of the cases heretofore cited as following Luther v. Borden, question presented to the court was one of degree between two forms of government which were in some way responsible to the electors. It is respectfully submitted that the statement from Sailors v. Board of Education, 387 U.S. 105 (1967)(Appendix page A-34) to the effect that viable local government may need many innovations, numerous combinations of old and new services, great flexibility in municipal arrangements to meet changing urban conditions and that nothing in the constitu-

tion prevents such experimentation does not apply in the situation where there is a complete absence of a republican form of government.

Petitioners contend that under the Guaranty Clause of the Constitution that direct or indirect control of the selection of the Board of Trustees for Utilities of the Department of Public Utilities of the City of Indianapolis through an elected official is mandated. The guarantee of a republican form of government does require that such a branch of government be administered by individuals who are responsible to public officers.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Mayor of the City of Indianapolis is elected by th-

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qualified electors residing within the boundaries of the city, and he in turn in administering the city government has broad appointive powers to permit him to select those persons who will be charged with administrative responsibilities in various departments of the city government and also in the appointment of members of administrative boards and other public authorities which exercise jurisdiction within the same geographical territories. There is one exception to the mayor's appointive powers found in Indiana Code 1971, 19-4-24-4 which mandates the mayor to appoint the successor trustees nominated by the Board of Trustees for facilities in the City of Indianapolis.

In the exercise of the franchise the electors in voting for the mayor do in some degree influence the administration of those departments and boards to which the mayor has appointive power; and,to the extent that the electors are vested with the right to vote for the mayor of Indianapolis, they in turn have some indirect influence on the government administered by the various departments to which the mayor controls appointments.

The power of appointment of an elected official when coupled with the right of the electors to exercise the franchise in the choice of that elected official gives effect to the franchise which would not exist if the power of appointment were denied to the elected official. One of the most

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pertinent examples of the result of the exercise of the franchise in selecting an elected official which in turn results in a modification of policy or direction in another branch of government is that of the election of President Nixon and his subsequent appointments to the Supreme Court of the United States. Although the electors of the United States do not vote for the Justices of the United States Supreme Court, they can indirectly through the exercise of their franchise influence the direction of the Court.

In a case involving an Ohio statute which had the practical effect of excluding all but the Republican and Democratic parties from the ballots in Ohio elections, the Supreme Court rejected the argument that the political question was involved merely because the right sought to be protected involved political preferences. There the Court stated that invidious distinctions cannot be enacted without a violation of the Equal Protection Clause and in determining whether or not a state law violates the Equal Protection Clause the Court must consider the facts and circumstances behind the law, the interest which the state claims to be protecting and the interest of those who are disadvantaged by the classification. The Court further stated that no right is more precious in a free country than that of having a voice in the election of those who make the laws and that other rights, even the most basic are illusory if the right

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to vote is undermined. Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Also in Reynolds v. Sims, 377 U.S. 533, 555 (1964), the Court stated that the right to vote freely for the candidate for ones choice is of the essence of a democratic society and any restriction on that right strikes at the heart of a representative government and the right of suffrage can be denied by debasement or delusion of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

In Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50, 55, (1970), the court stated that while there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. The Court also refused to distinguish between legislative officials and administrative officers for the reason that governmental activities cannot be easily classified in the neat categories favored by civics text.

The Court of Appeals in its entry of May 30, 1972, relies heavily upon Sailors v. Board of Education, 387 U.S. 105 (1967). That case involved the question of the appointment of a board of education by the elected officials of school boards lying within the county, and, therefore, does not apply in this case which the question raised is that no one on the Board of Trustees is appointed by an elected official.

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In removing the Board of Trustees for Utilities in the City of Indianapolis from the control of any elected official, the electors of the City of Indianapolis are denied full effect of the franchise which they exercise in the election of the Mayor of the City of Indianapolis, therefore, they are denied equal protection under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons above set forth the Petitioners respectfully suggest that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Robert V. Bridwell
322 Circle Tower
5 East Market Street
Indianapolis, Indiana 46204

Paul Hirsch
3602 North Meridian Street
Indianapolis, Indiana 46208

John F. Neff
1430 Circle Tower
5 East Market Street
Indianapolis, Indiana 46204
Of Counsel

APPENDIX

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 30, 19 72

Before

Hon. F. RYAN DUFFY, Sr. Circuit Judge

Hon. ALFRED P. MURRAH, Sr. Circuit Judge *

Hon. WILLIAM G. JUERGENS, District Judge **

PAUL F. CANTWELL et al.
Plaintiffs-Appellants
v.
BOARD OF TRUSTEES FOR UTILITIES AND BOARD OF DIRECTORS FOR UTILITIES OF its Department of Public Utilities of the City of Indianapolis, in the Name of the City of Indianapolis, a Municipal Corporation of the State of Indiana, Doing Business as CITIZENS GAS & COKE UTILITY, et al.
Defendants-Appellees.

No. 71-1468

Appeal from the United States District Court for the Southern District of Indiana

Cale J. Holder, Judge
No. 70-CR-302

ORDER

Argued February 16, 1972

This suit is before us appealing the dismissal by the District Court of a supplemental complaint for a de-

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(*) Senior Circuit Judge Alfred P. Murrah of the Tenth Circuit is sitting by designation.
(**)Chief District Judge William G. Juergens of the Eastern District of Illinois is sitting by designation.

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claratory judgment and injunctive relief. Specifically, plaintiffs, as a class, requested declaratory relief with respect to the constitutionality of certain provisions of the Indiana Code of 1971 providing for succession of members on the "Board of Trustees for Utilities" in "cities of the first class" in Indiana, and furthermore, requested the Court to enjoin certain defendants from doing business as Citizens Gas & Coke Utility with a receiver to operate the utility pendente lite.

The motion to dismiss filed by defendants was succeeded by the order of the District Court on April 16, 1971, dismissing the supplemental complaint from which plaintiffs appeal.

The controlling state statutes[1/] were enacted by the Indiana General Assembly to provide a method whereby the City of Indianapolis and other Indiana cities of the first class could hold legal title to the gas utility trust assets, beneficially owned by the residents of the cities, and to provide for management of the utility plants.

Plaintiffs argue that the statute sections deny

1/ Indiana Code of 1971, Secs. 19-3-24-1 and 19-3-24-10.

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them their right to a Republican form of government under the Guaranty Clause of the Fourth Amendment of the United States Constitution; that the statute also denies them equal protection of the laws under the Fourteenth Amendment.

We disagree with these contentions of the plaintiffs. We fully agree with the well-drafted order and decision of District Judge Holder. Since the order and decision has not been printed in the Federal Supplement, we attach hereto a copy of Judge Holder's order of April 16, 1971 and adopt it in its entirety as though it were our own.

The order and judgment of the District Court is

A F F I R M E D

ENTRY OF APRIL 16, 1971 SUSTAINING
MOTIONS TO DISMISS

The matters of the motion to dismiss filed by all defendants, except the defendant, Richard G. Lugar, on March 20, 1970, and the motion to dismiss filed by the defendant, Richard G. Lugar, on March 23, 1970, and refiled as to the March 24, 1971 supplemental complaint on March 29, 1971 and March 31, 1971, respectively, came on before the Court for ruling. The Court, having read and considered the motions, the supporting brief filed on March 20, 1970, and refiled on March 29, 1971, by all defendants, except Richard G. Lugar, the plaintiffs' September 15, 1970 answer brief (deemed by the Court to have been refiled subsequent to the filing of the supplemental complaint), and the reply

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brief filed on September 30, 1970 (and refiled on March 29, 1971) by all defendants except Richard G. Lugar, and being otherwise duly advised in the premises, does now submit its ruling.

The defendants' motions to dismiss are hereby SUSTAINED for the reason that the supplemental complaint fails to state a claim upon which relief can be granted. It is, therefore, ORDERED and ADJUDGED that the above entitled cause be and is hereby DISMISSED, with costs of the action to be assessed against the plaintiffs.

The plaintiffs commenced this action by the filing of a two count complaint on February 27, 1970 which was superseded by a supplemental complaint filed on March 24, 1971. Plaintiffs purport to bring this action as representatives of a class of persons numbering in excess of 300,000 of which plaintiffs are members. Count I of the supplemental complaint is an action for declaratory relief; Count II of the supplemental complaint is an action for injunctive relief. Both counts challenge the constitutionality of certain provisions of the Indiana Code of 1971 providing for succession of members on the "Board of Trustees for Utilities" in "cities of the first class." The challenged provisions provide in relevant part as follows:

"Chapter 24. Departments of Public Utilities in First-Class Cities.

"Sec. 1. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled 'An act concerning municipal corporations,' approved March [illegible],

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1905, and acts amendatory thereof and supplemental thereto, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall have as its head and be under the general supervision and control of a board of seven (7) members, to be known as the 'Board of Directors for Utilities,' to be appointed annually by the board herein provided for and designated as the 'Board of Trustees for Utilities.'

"****.

"BOARD OF TRUSTEES--EXPIRATION OF TERM--
[illegible]--PROCEDURE

"At the expiration of the respective terms of each of the members of the board of trustees so originally appointed, the said board of trustees shall nominate the successors thereof to membership on such board, each of which nominees shall be appointed by the mayor within ten (10) days after receiving such nominations, and each succeeding member shall serve for a term of four (4) years. In the event any person who has been appointed at any time as a member of such board of trustees shall fail to qualify within ten (10) days after the mailing to him of notice of his appointment, or if any member after qualifying shall die, resign, vacate such office by becoming a nonresident of such city, or be removed as hereinafter provided; new members of such board of trustees shall be chosen to fill such vacancy in the same manner as is provided for the member in whom such vacancy occurs, and the member so chosen shall serve for the remainder of the term for which the member whose place is so filled was appointed.

"****."

Indiana Code [illegible] 54-24-1.

Bureau of formalities Count I of the complaint alleges that plaintiffs reside in Indianapolis, Indiana; that plaintiffs are registered voters therein; that plaintiffs are customers of the defendant utility, Indiana Gas & Coke Utility, [illegible] for natural gas provided by said utility at rates fixed by the [illegible] Service Board of Indiana; that the Board of

Directors for Utilities of the Department of Public Utilities for the City of Indianapolis *** have (sic) the power to levy taxes *** upon the plaintiffs *** and the class they represent" [1,2]; that members of the Board of Trustees for Utilities and of the Board of Directors for Utilities are in fact officials of the municipal government of Indianapolis; but that pursuant to the terms of §19-3-24-1 of the Indiana Code

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Footnote 1. It appears from the complaint that plaintiffs seek to bring this action on behalf of all persons who are both customers of Citizens Gas & Coke Utility and registered voters residing in Indianapolis, Indiana.

Defendants contend that plaintiffs "have failed to bring themselves within the minimal conditions for the maintenance of a Rule 23 class action." The Court does not reach this issue, having decided that the complaint must be dismissed for the reasons set out below.

Footnote 2. Indiana Code of 1971 §19-3-24-10 confers a limited taxing power upon the Board of Directors, which section provides, in part, as follows:

> "Sec. 10. For the purpose of raising money to pay all bonds issued as provided in section eight, and the interest thereon, to the extent that moneys are not available therefor in the judgment of the board of directors for utilities from the operations of said utility plant or plants so owned by said city, the board of directors for utilities, as an official board of said utility district, is hereby empowered to levy, and shall levy each year, a special tax upon all the property of said utility district in such manner as to meet and pay the principal of said bonds as they severally mature, together with all accruing interest thereon. ***."

of 1971, the plaintiffs are denied the right to vote for an elective official with the power of appointment over the Board of Trustees: that the nomination and appointment of successor members on the Board of Trustees in the manner provided in §19-3-24-1 constitutes a denial of the constitutional guarantee of a republican form of government to the plaintiffs. Federal Constitution, Article 4, §4 5.; that the Board of Directors, although not directly responsible to an elected representative of the plaintiffs, has the power to levy taxes upon the plaintiffs, which power constitutes taxation without representation in violation of the Due Process Clause of the Fourteenth Amendment; wherefore, the plaintiffs pray that the Court declare (1) that such portion of §19-3-24-1 as provides for the nomination and appointment of members of the Board of Trustees is unconstitutional, (2) that the office of each member on the Board of Trustees and on the Board of Directors shall be vacated, and (3) that the Court shall retain jurisdiction of the cause pending enactment of corrective legislation. Count II realleges all of the allegations of Count I and further alleges that defendant Boards

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5. Although it is not specifically apparent from the complaint, plaintiffs' September 15, 1972 reply brief at pages 4 and 5 discloses that the plaintiffs do not challenge the constitutionality of that part of §19-3-24-1 which provides for the annual appointment of trustees by the Board of Directors by the Board of Trustees. The plaintiffs contend only that the denial of the right to vote for an elective official with the power of appointment over the Board of Trustees constitutes a violation of the Guaranty Clause.

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are actively engaged in the mismanagement of the utility and are likely to continue to do so and seeks to have the Court enjoin the Boards from doing business as Citizens Gas & Coke Utility and to appoint a receiver to operate the utility pendente lite.

Upon the filing of the original complaint on February 2[illegible], 1970, Cause Number IP 70-C-121 was drawn and the cause assigned to the docket of Chief Judge William E. Steckler. Judge Steckler set the matter down for a hearing in his chambers on March 18, 1970 and, at the hearing, directed Robert V. Bridwell, one of the attorneys for the plaintiffs, to prepare a memorandum of the matters discussed, which memorandum has never been filed. Immediately following the hearing, Judge Steckler disqualified himself as presiding Judge because of a possible conflict of interest, and the cause was transferred to the docket of Judge Dale J. Holder. Thereafter motions to dismiss were filed by the defendants on March 20, 1970 and March 23, 1970 with a supporting brief being filed with the March 20, 1970 motion. Nearly four months later, on July 17, 1970, plaintiffs belatedly moved for an enlargement of time in which to oppose the motions to dismiss, which the Court, in its discretion, granted on July 20, 1970.[4] The plaintiffs'

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[4] On July 21, 1970 and apparently before receipt of the Court's July 20, 1970 entry, the defendants filed a memorandum in opposition to plaintiffs' motion for enlargement of time on the grounds that the motion was not timely and further noting that Attorney Bridwell had not filed the memorandum of matters discussed at the March 18, 1970 hearing. In view of the [illegible] entry of July 20, 1970, the issued raised in the brief were moot.

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answer brief was filed on September 15, 1970 and defendants' reply brief, on September 30, 1970. Subsequent to the enactment of the Indiana Code of 1971 on January 19, 1971 plaintiffs, with leave of Court, filed a supplemental complaint on March 24, 1971. Upon petitions of the defendants, the motions to dismiss and briefs were ordered refiled as to the supplemental complaint on March 30, 1971 and March 31, 1971, respectively.

The grounds for dismissal alleged in both motions are identical: (1) That the plaintiffs are not the real parties in interest pursuant to Rule 17(a) of the Federal Rules of Civil Procedure; (2) That the Court lacks subject matter jurisdiction over the complaint; and (3) That the complaint fails to state a claim upon which relief can be granted.

The Court deals first with the defendants' motions to dismiss as they apply to Count I of the complaint.

1. Defendants contend that the complaint should be dismissed because the plaintiffs do not have standing to maintain this action for the reason that the plaintiffs are not the real parties in interest. Specifically, defendants contend that the complaint is an action to enforce the terms of a public charitable trust and that the Attorney General of Indiana, not the plaintiff beneficiaries, is the proper party to enforce the terms of the trust. It is well established, both that the property of Citizens Gas & Coke Utility is that of a public charitable trust, Todd v. Citizens Gas Company of Indianapolis, 46 F.2d 873 (7 Cir. 1931); Williams v. Citizens

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Gas Co., 206 Ind. 448 (1935); Chase National Bank v. Citizens Gas Company, 115 F.2d 217 (7 Cir. 1940) and, that, under Indiana Law, the Attorney General of Indiana is the proper party to enforce the terms of a charitable trust, Boice v. Williams, 121 Ind.App. 210 (1951). However, defendants are in error in construing Count I of the complaint to be an action for the enforcement of the terms of a charitable trust. Count I does not set out any of the terms of the trust nor does it allege that the action is founded upon any of the terms of the trust. To the contrary, it clearly purports to challenge the constitutionality of the Indiana Code of 1971 as amended insofar as that section provides for the succession of members to the Board of Trustees in a manner that is not directly responsive to the electorate. Count I of the present action is not one to enforce the terms of a charitable trust.

If the plaintiffs were to prevail upon the merits of Count I, it might then be necessary for the Attorney General of Indiana to bring an action in equity in the State Court system to have the terms of the trust modified to conform to constitutional requirements. For the reasons set out below, however, the Court holds that Count I of the complaint fails to state a claim upon which relief can be granted and that it will not exercise pendent jurisdiction over that portion of Count II which seeks relief from the defendants' alleged "mismanagement" of the utility.

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2. Defendants also contend that the Court lacks jurisdiction over the subject matter of the complaint for the reason that the plaintiffs have failed to allege a minimum jurisdictional amount in controversy. Count I alleges that this action is "brought under the terms of 28 U.S.C. Section 1343 and 28 U.S.C. Section 1331(a)" but does not allege that the matter in controversy exceeds the sum or value of $10,000.00.[5]

Footnote 5. Plaintiffs' answer brief argues that jurisdiction is founded on 28 U.S.C. §1331(a) and 28 U.S.C. §1343(3). Sections 1331(a) and 1343(3) provide as follows:

> "§1331. Federal question; amount in controversy, costs
>
> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.
>
> ***."

> "§1343. Civil rights and electric franchise
>
> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ***;
>
> (3) To redress the deprivation, under color of any State Law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> ***."

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Plaintiffs take the position that no minimum jurisdictional amount need be alleged in a suit to enforce or protect a personal right arising under the Constitution, laws, or treaties of the United States. Defendants concede that no jurisdictional amount need be pleaded in an action to enforce or protect personal rights, but contend that the present action is one to enforce a property or monetary right as shown by the fact that plaintiffs bring this action as taxpayers residing within the utility district [6.] and as subscribing customers of the defendant utility. The fact that plaintiffs describe themselves in part [7.] as taxpayers in the utility district and as customers of the defendant utility is not

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Footnote 6. Indiana Code of 1971 §19-3-24-6 provides as follows:

"Sec. 6. Upon the taking effect of this act and the organization of such board of directors for utilities, as hereinbefore provided, all of the territory included within the corporate limits of any said city shall become and constitute a utility district for the purpose of providing for the furnishing of utility service in such lines of utility operation as may be taken over or owned by said city, and thereafter said utility district shall be deemed duly created and established under and pursuant to the provisions of this act."

Footnote 7. Plaintiffs also allege that they are qualified voters, residing within the City of Indianapolis, Indiana.

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determinative of the jurisdictional question presented with respect to Count I, that is, whether the plaintiffs' action is one to protect a personal right or a property right. The right which the plaintiffs seek to enforce in Count I is the alleged right to vote for an elected official with a power of appointment over the Board of Trustees. The plaintiffs ask the Court to exercise its equitable powers to enforce this right but do not seek monetary damages. The Court now holds that if the qualified voters who reside in the utility district have a constitutional right to have the successor members of the Board of Trustees appointed in a certain manner, that right is a personal right and not a property right. The defendants have cited no authority to the contrary. The Court further holds that it does have subject matter jurisdiction over the plaintiffs' action for the enforcement of an alleged personal right arising under the Constitution pursuant to 28 U.S.C. §1343(3)[8], even in the absence of any allegation of a certain monetary value being in controversy. See Hague v. CIO, 307 U.S. 496 (1939).

The defendants also contend that the Court does not have subject matter jurisdiction over the action because the right sought to be enforced arises under the Guaranty Clause. An

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Footnote 8. Absent an allegation of a minimum jurisdictional amount in controversy the plaintiffs have not properly alleged jurisdiction under 28 U.S.C. §1331(a). See Hague v. CIO, 307 U.S. 496 (1939).

The defendants also contend that the Court does not have subject matter jurisdiction over the action because the right sought to be enforced arises under the Guaranty Clause. An action to enforce a constitutional right arising under the Guaranty Clause raises a question of justiciability, not of jurisdiction. Baker v. Carr, 369 U.S. 186 (1962).

4. Finally, the defendants contend that the complaint fails to state a claim upon which relief can be granted. Plaintiffs attempt to support their claim that the Indiana Code of 1971 §19-3-24-1 is unconstitutional on three theories. The first theory is that §19-3-24-1 in its present form constitutes a denial of a republican form of government in violation of the Guaranty Clause. Secondly, plaintiffs contend that §19-3-24-1 violates the Equal Protection Clause. The third theory is that §19-3-24-1 permits "taxation without representation" in violation of the Due Process Clause of the Fourteenth Amendment.

With respect to the first theory, the defendants contend that a challenge to a state statute on the ground that it is inconsistent with the Guaranty Clause presents no justiciable question. The Court agrees. In Baker v. Carr, 369 U.S. 186, [illegible] (1962), the Supreme Court reviewed its holding in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), that "the Guaranty Clause is not a repository of judicially manageable standards," and noted that since Luther v. Borden it has consistently refused to resort to the Guaranty Clause as the source of a constitu-

tutional standard for invalidating state action, citing Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Pacific States Tel. & T. Co. v. Oregon, 223 U.S. 118 (1912); Kiernan v. Portland, 223 U.S. 151 (1912); Marshall v. Dye, 231 U.S. 250 (1913); O'Neill v. Leamer, 239 U.S. 244 (1915); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937).

In their September 15, 1970 answer brief (deemed to have been refiled after the filing of the supplemental complaint), plaintiffs also contend that "*** Hadley v. the Junior College District of Metropolitan Kansas City (sic) (397 U.S. 50 (1970)) does have a bearing on the matter here in that the extension of equal protection guarantees to the level of local government was confirmed." This statement is the only indication that plaintiffs are seeking to attach S19-3-24-1 as violative of the Equal Protection Clause of the Fourteenth Amendment. However, the Court concludes that any such reliance on the Equal Protection Clause by the plaintiffs is misplaced. In Avery v. Midland County, 390 U.S. 474, 484-485 (1968), the Supreme Court held that "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body."

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Last term, the Supreme Court held the "one man, one vote" principle to be applicable to the election of trustees of the Junior College District of Metropolitan Kansas City, Missouri, pursuant to the Equal Protection Clause, Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970). In Hadley, the appellants argued that the "one man, one vote" principle was constitutionally required under the holding in Avery because the junior college trustees could exercise "general governmental powers over the entire district" since the trustees were empowered to levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school district, acquire property by condemnation, and manage the operation of the junior college generally. The Supreme Court agreed with the appellants in Hadley that the powers of the trustees were general enough and had sufficient impact throughout the district "to justify the conclusion that the principle which we applied in Avery should be applied here." 397 U.S. 54. However, the Supreme Court's holding that the "one man, one vote" principle was applicable to the election of the trustees was not based upon the Court's finding that the office of junior college trustee was more "legislative" than "administrative" in nature. The Court expressly stated that it could not perceive any "judicially manageable standards" to aid in the making of such distinctions. 397 U.S. 55. The Court

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merely held that once "a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election." 397 U.S. 56. The Supreme Court then noted that it had previously held that "where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection. Sailors v. Board of Education, 387 U.S. 105 (1967)." Quoting further from Sailors the Supreme Court approved its previous statement that "'viable local government may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.'" 397 U.S. 58-59.

In the present cause, the Board of Directors has a limited bonding and taxing power, and the Board of Trustees and the Board of Directors have other general powers which relate almost exclusively to the management of public utilities.[9]

Footnote 9. See Indiana Code of 1971, §§19-3-24-1 through 19-3-24-18, especially §§19-3-24-8 through 19-3-24-11, §§19-3-24-19 through 19-3-24-24.

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where local government officials are not selected by popular vote, the "one man, one vote" principle does not apply. Where, a State delegates less than full governmental powers to non-elected local officials, the Court lacks any judicially manageable standards to determine whether such delegation of power constitutes a violation of the Guaranty Clause. Baker v. Carr, 369 U.S. 186 (1962); Avery v. Midland County, 390 U.S. 474 (1968); Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970). The Court, therefore, holds that Count I of the plaintiffs' complaint fails to state a claim upon which relief can be granted under the Guaranty Clause because the facts of the case present a non-justiciable question. The Court further holds that Count I fails to state a claim upon which relief can be granted under the Equal Protection Clause for the reason that the Equal Protection Clause principle of "one man, one vote" is not applicable when a local governmental official is selected by other than popular vote. Sailors v. Board of Education, 387 U.S. 105 (1967).

Under their third theory, plaintiffs allege that the empowering of an appointed official who is not directly responsive to the electorate with a power of taxation constitutes "taxation without representation" in violation of the Due Process Clause of the Fourteenth Amendment. The Court finds

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Footnote 10. Cf. Heald v. District of Columbia, 259 U.S. 114 (1922).

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however, does not allege that the defendants have ever exercised the limited taxing power conferred upon them by the Indiana Code of 1971 §19-2-24-10 or that the defendants propose to do so. In the absence of any such allegation, Count I of plaintiffs' complaint does not present a "concrete legal issue" for adjudication. "A hypothetical threat is not enough." United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947). The Court concludes that, with respect to the third theory of action under the Due Process Clause, the plaintiffs have failed to allege facts showing that a "case" or "controversy" exists over which the Court has jurisdiction.

The above holdings are equally applicable to Count II of the complaint to the extent that Count II realleges all of the allegations of Count I. To the extent that Count II of the complaint alleges a state cause of action for enforcement of a public charitable trust, the Court declines to exercise jurisdiction, and Counts I and II are, therefore, both dismissed. It is doubtful whether this Court has the power to exercise pendent jurisdiction over a state cause of action where the Federal claims are dismissed before trial. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). It is clear, however, that the Court need not exercise its power of pendent jurisdiction in every case in which it is found to exist. Pendent jurisdiction is a doctrine of discretion. 383

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U.S. at 726. The Court's decision to decline the exercise of pendent jurisdiction in the present case is buttressed by the fact that the plaintiffs would not be the real parties in interest in an action against the defendants for mismanagement of a public charitable trust. Such an action must be brought by the Attorney General of Indiana.

Dated this 15 th day of April, 1971.

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PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION

Section 4, Article IV, of the Constitution of the United States provides as follows:

> "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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PERTINENT PROVISIONS OF THE INDIANA STATUTES

Indiana Code 1971, 19-3-24-1

Chapter 24. Departments of Public Utilities in First-Class Cities.

Sec. 1. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporation(s)," approved March 6, 1905, and acts mendatory thereof and supplemental thereto, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall have as its head and be under the general supervision and control of a board of seven (7) members, to be known as the

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ard of Directors for Utilities," to be appointed annually
the Board herein provided for and designated as the "Board
Trustees for Utilities."

BOARD OF TRUSTEES FOR UTILITIES-MEMBERS-APPOINTMENT-TERMS

Said Board of Trustees for Utilities, as originally con-
uted, shall consist of five (5) members, two (2) of whom
ll be chosen and appointed by the mayor of such city of
first class [illegible] (2) of whom shall be appointed by the
on nomination of the judge of the circuit court of the
nty in which said city is situated; and one (1) of whom
ll be appointed by the mayor on nomination of the city
uncil. Such appointments shall be made within sixty (60) days after this act
omes effective. In the case of cities hereafter falling
into the class for the first time prescribed, sixty (60) days after
publication by the United States census establishing such
population, the common council of such city, and the judge of
the circuit court of the county in which said city is located,
shall transmit in writing to the mayor of such city of the
first class their respective nominations of members of said
Board of Trustees for Utilities, and the mayor shall appoint
the nominees to membership on such board not later than ten
(10) days after the expiration of said sixty (60) day period.
At the same time such mayor shall appoint the two (2)
members to be appointed by him himself. In such original appoint-
ments of members to be chosen by the mayor, one (1) shall be
appointed for a period of three (3) years and one (1) for a

period of four (4) years from the date of such appointment; the trustees nominated by the city council shall be appointed for a period of two (2) years from the date of such appointment; of the two (2) to be nominated by the judge of the circuit court, one (1) shall be appointed for a period of one (1) year, and one (1) for a period of four (4) years.

All such trustees and all successors thereof shall hold over after the expiration of their terms until their respective successors have been duly appointed and have qualified.

BOARD OF TRUSTEES-EXPIRATION OF TERMS-NOMINATIONS FOR NEW TERMS-PROCEDURE

At the expiration of the respective terms of each of the members of the Board of Trustees so originally appointed, the said Board of Trustees shall nominate the successors thereof to membership on such board, each of which nominees shall be appointed by the mayor within ten (10) days after receiving such nominations, and such succeeding members shall serve for a term of four (4) years. In the event any person who has been appointed at any time as a member of such Board of Trustees shall fail to qualify within ten (10) days after the mailing to him of notice of his appointment; or if any member after qualifying shall die, resign, vacate such office by becoming a nonresident of such city, or be removed as hereinafter provided; new members of such Board of Trustees shall be chosen to fill such vacancy in the same manner as is provided for

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the member as to whom such vacancy occurs, and the member so chosen shall serve for the remainder of the term for which the member whose place is so filled was appointed.****

Indiana Code 1971, 19-3-24-6

Sec. 6. Upon the taking effect of this act and the organization of such board of directors for utilities, as hereinbefore provided, all of the territory included within the corporate limits of any said city shall become and constitute a utility district for the purpose of providing for the furnishing of utility service in such lines of utility operation as may be taken over or owned by said city, and thereafter said utility district shall be deemed duly created and established under and pursuant to the provisions of this act.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

PAUL F. CANTWELL, et al.,
Petitioners,

vs.

BOARD OF TRUSTEES FOR UTILITIES and BOARD OF DIRECTORS FOR UTILITIES OF ITS DEPARTMENT OF PUBLIC UTILITIES OF THE CITY OF INDIANAPOLIS, IN THE NAME OF THE CITY OF INDIANAPOLIS, a Municipal Corporation of the State of Indiana, Doing Business as CITIZENS GAS & COKE UTILITY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX

STATEMENT

Petitioners' action was initiated in the United States District Court for the Southern District of Indiana, Indianapolis Division. By the first count of their complaint petitioners sought to state a class action alleging the unconstitutionality of certain Indiana statutes providing for the selection and succession of the members of the

Board of Trustees of the Department of Public Utilities of the City of Indianapolis and for the appointment of the members of the Board of Directors of the Department of Public Utilities of the City of Indianapolis. By the allegations of Count I of the complaint, petitioners alleged that they, and members of the class they represent, were denied the guarantees of a republican form of government under Article 4, Section 4 of the Constitution of the United States and were being taxed without representation in contravention to the requirements of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

By Count II of their complaint, petitioners sought to obtain a preliminary injunction restraining the Department of Public Utilities from exercising control over the utility and sought to obtain the appointment of a receiver to operate it.

Petitioners alleged no other injury to themselves or others within the class.

Following the initiation of the suit by petitioners, the defendants who included the Board of Trustees and the Board of Directors of Utilities filed their motion to dismiss Count I pursuant to Rule 12 of the Rules of Civil Procedure alleging that the court lacked jurisdiction over the subject matter of the action, that plaintiffs (petitioners) were not the real parties in interest pursuant to Rule 17(A) of the Rules of Civil Procedure, and that the complaint failed to state a claim against defendants upon which relief could be granted. The same bases for the motion to dismiss were alleged in connection with the allegations in Count II with the exception of the real party in interest allegation.

On April 16, 1971, the District Court sustained the motion to dismiss as to both counts of the complaint on the

ground that the complaint failed to state a claim upon which relief could be granted.

Upon appeal to the United States Court of Appeals for the Seventh Circuit, that court in its order of May 30, 1972, affirmed the holding of the District Court below and adopted the opinion of Judge Holder in the District Court case as its own.

Judge Holder concluded that the petitioners' complaint failed to state a claim upon which relief could be granted. He discussed three aspects of the challenge to constitutionality made to the Indiana statutes by petitioners. First, he held that petitioners' challenge to the state statute on the ground that it was inconsistent with the guaranty clause of the United States Constitution presented no justiciable question. He further concluded that petitioners could not rely upon the equal protection clause of the Fourteenth Amendment for relief, although no allegation of the complaint raised this question. Finally, he held that the due process clause of the Fourteenth Amendment was not violated by a possible exercise of taxation without representation since there was no allegation in the complaint that the utility ever exercised the limited taxing power conferred upon it by statute or that the utility proposed to do so.

In its petition to this court, petitioners seek only to raise the questions of the applicability of the guaranty clause contained in Section 4, Article 4 of the Constitution of the United Sttaes and the applicability of equal protection under the Fourteenth Amendment. Due process in connection with taxation is not before this Court.

The management of the utility, which is the subject of the challenge of petitioners, traces its origin at least to 1887. The Court of Appeals for the Seventh Circuit had occasion to discuss the origin and nature of the utility in

Todd v. Citizens Gas of Indianapolis, 46 F. 2d 855 (7th Circ. 1931), cert. den. 283 U.S. 852, 75 L. Ed. 1459. In the **Todd** case it was pointed out that the properties of the Utility were those of a public charitible trust for which the City of Indianapolis is the Successor Trustee.

In 1905 the City entered into a franchise contract for the furnishing of the inhabitants of the City with gas service obligating the supplier to create a corporation "under the control of five trustees, to be named in the Articles of Incorporation (one of them to be nominated by the Mayor), which Board of Trustees shall have full, complete, exclusive and irrevocable power during the continuance of the corporation to hold the stock and vote the same as fully and completely as if they were the owners of the stock, to elect directors and fill vacancies in the Board of Directors" (46 F. 2d at 858).

The original ordinance in 1905 further obligated the company to manage itself by a Board of Directors of nine members to be chosen by the Board of Trustees. The ordinance further provided for the ultimate conveyance of the property to the City of Indianapolis.

The trust concept employing a Board of Trustees and a Board of Directors for governing the utility predated creation of Citizens Gas Company by many years. The predecessor to Citizens was Consumers' Gas Trust Co. which was created in 1887. It was managed by a Board of Trustees of 5 members who selected a Board of Directors of 9 members. **Consumers' Gas Trust Co. v. Quimby**, 137 Fed. 882 (7th Circ. 1905), cert. den. 198 U.S. 585, 49 L. Ed. 1174.

The present method of operation and management of the utility property therefore has a history of 85 years. The Board of Trustees continues to appoint members of the Board of Directors who actively operate utility facili-

ties. The selection of the Board of Directors and the Board of Trustees is approved by the Mayor of the City of Indianapolis.

The **Todd** decision further recites that on March 11, 1929 the General Assembly of Indiana passed an act authorizing the conveyance of the utility property to the City. Acts 1929, Chapter 78, page 268.

At the time of the acquisition of the utility by the City, the court in **Todd** held:

> "The legal title to the property which was acquired with the money contributed by the certificate holders was in the Citizens' Company, subject to the trust in favor of the inhabitants of the city."

46 F. 2d at 866.

> "Conveyance to the city to be made when the charge in favor of certificate holders was released was a continuance of the trust; the city being the successor in the fiduciary relationship."

Simultaneously with the adoption of the statute authorizing the acquisition by the City of utility property, the General Assembly of Indiana enacted Chapter 77 providing for its management and operation. Chapter 77 as approved March 11, 1929, which along with Chapter 78 of the Acts of 1929 are set out in the appendix attached hereto, provides the methods of government and control of the utility still substantially in effect and challenged by petitioners herein. It is identical in many respects to the organization of management created in 1887.

Indiana Code 1971, 19-3-24-1, provides qualifications of trustees. It states:

> "No person shall be appointed as trustee who is less than 35 years of age and who has not been a resi-

dent of such city for at least five years immediately preceding his appointment. If any such trustee shall cease to be a legal resident of said city, his membership on said board shall thereby terminate and become vacant."

A similar qualification for members of the Board of Directors provides:

"No person shall be appointed a member of said Board of Directors for Utilities unless he is a bona fide resident of said city and has been such for five years immediately preceding such appointment and is at least 35 years of age. If any such Director shall cease to be a legal resident of said city during the term for which he was appointed, his membership on such Board shall thereby terminate and become vacant."

The same statute further authorizes the removal from office of any trustee "for neglect of duty, incompetence, disability to perform his duties or other good cause, by an order and judgment of the Circuit or Superior Court of the county in which such city is located". The full section of Indiana Code 1971, 19-3-24-1 is attached as a part of the appendix herein.

ARGUMENT

A—Petitioners Are Not Entitled to Relief Under the Guaranty Clause of the Constitution

Petitioners contend that they are entitled to relief pursuant to the provisions of United States Constitution Article 4, Section 4, which provides:

> "The United States shall guarantee to every state in this Union a republican form of government and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

The clause is not applicable to the instant case for three reasons:

(1) Article 4, Section 4 does not create a private individual right or remedy, but constitutes only a guaranty on the part of the United States government to individual state governments.

(2) There is nothing inconsistent between Article 4, Section 4, guaranteeing a republican form of government to each state and the method of selecting management of the utility set out in the Indiana statutes.

(3) Even in the event there should be an inconsistency between Article 4, Section 4, and the Utility statutes, and even should the section of the United States Constitution grant a private right rather than merely constituting a guaranty to the states, the United States Supreme Court has repeatedly held that such questions are nonjusticiable.

Article 4, Section 4, by its express terms, clearly constitutes a guaranty on the part of the United States to the states. Nothing within the language purports to create rights on the part of individual citizens or provide

such citizens with remedies different from those provided by other provisions of the Constitution.

The origin of Article 4, Section 4, can be traced by an examination of the notes kept by James Madison of the Constitutional Convention, using as a guide Madison's "Journal of the Federal Convention" edited by E. H. Scott (Chicago, 1894). It appears that a Mr. Randolph initially proposed the incorporation of a comparable provision during the early proceedings of the convention. His resolution was:

> "RESOLVED, that a republican government in the territory of each state except in the instance of a voluntary injunction of government and territory, are to be guaranteed by the United States to each state."

The resolution was not debated extensively, but to the extent it was discussed, it appears clear from Madison's notes that the guaranty was directed solely for the protection of states, not individuals. For July 18, 1787, the following discussion is recorded by Madison:

> "Mr. Governor Morris thought the resolution very objectionable. You should be very unwilling that such laws as exist in Rhode Island should be guaranteed.
>
> "Mr. Wilson: The object is merely to secure the states against dangerous commotions, insurrections and rebellions.
>
> "Colonel Mason: If the general government should have no right to suppress rebellions against particular states, it will be a bad situation, indeed; as rebellions against themselves originate in and against the individual states, it must remain a passive spectator to its own subversion.
>
> "Mr. Randolph: The resolution has as its object: first, to secure a republican government, secondly, to sup-

press domestic commotions. He urged necessity of both these provisions.

. . . . . .

"Mr. Gorham thought it strange that a rebellion should be known to exist in the empire and the general government should be restrained from interposing to subdue it. At this rate an enterprising citizen might erect a standard of monarchy in a particular state, might gather together partisans from all quarters, might extend his views from state to state, and threaten to establish a tyrantry over the whole and the general government be compelled to remain an inactive witness of its own destruction. With regard to different parties in a state so long as they confine their disputes to words, they will be harmless to the general government and to each other. If they appeal to the sword, it will then be necessary for the general government, however difficult it may be, to decide on the merits of their contest to interpose and put an end to it."

Chief Justice Taney recognized in **Luther v. Borden,** 48 U.S. 1, 12 L. Ed. 581 (1849), that the guaranty was one to the states. He said:

"Under this Article (Article 4, Section 4) of the Constitution, it rests with Congress to decide what government is the established one in a state, for as the United States guaranteed to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not."

Mr. Daniel Webster, in his argument before the Supreme Court in **Luther v. Borden,** supra, stated:

"What do the Constitution and laws of the United States say upon this point? The Constitution recog-

nizes the existence of states and guarantees to each a republican form of government and to protect them against domestic violence. **The thing which is to be protected is the existing state government.**" (emphasis supplied.)

Mr. Chief Justice Chase in **Texas v. White,** 74 U.S. 700, 19 L. Ed. 227 (1869) pointed out that the remedy under Article 4, Section 4, is solely that of the legislative branch of the government. He concluded that the actions on the part of the executive branch in establishing a republican form of government in Texas constituted nothing more than the creation of an interim state under the war powers of the President as Commander in Chief and that only Congress ultimately could create the republican form described by the Constitution.

Justice Cardozo recognized in **Highland Farms Dairy v. Agnew,** 300 U.S. 608, 81 L. Ed. 835 (1937) that the guaranty clause only permits Congress to inquire into the active existence of a republican form, and not into the mechanism or operations of that government. In discussing the limitations of the guaranty clause, Justice Cardozo said:

> "How power shall be distributed by a state among its governmental organis is commonly, if not always, a question for the state itself."

Thus he concluded that a Virginia law establishing a milk commission with broad powers did not constitute a denial of the republican form of government.

Nothing in the supplemental complaint of Cantwell establishes the lack of a republican form of government for the State of Indiana. The Acts of 1929, Chapter 77 or 78 (Burns, Indiana Statutes 48-7101 et seq. and 7218), I.C. 1971 19-3-24-1 and I.C. 1971 19-3-9-1, in no way diminish

or remove the basic ingredients of a republican government.

Mr. Justice Wilson in his opinion in **Chisholm v. Georgia**, 2 U.S. 419, 1 L. Ed. 440, 456 (1793) defined a republican form as follows:

> "As a citizen, I know the government of that state to be republican; and my short definition of such a government is,—one constructed on this principle, that the supreme power resides in the body of the people."

Thus it can be seen that the allegations in the complaint and the facts in the record before this Court fail to establish any violation on the part of Indiana of the maintenance of a republican form of government or the creation of any individual right under Article 4, Section 4, which would give rise to Plaintiffs' cause of action.

Even if such interference with the dictates of Article 4, Section 4, should be deemed to exist, the United States Supreme Court has repeatedly held that matters governing the maintenance and enforcement of a republican form of government as provided in Article 4, Section 4, are not matters in which the judiciary will interfere. **The Courts deem such matters as political and thus nonjusticiable.**

As Justice Cardozo stated in **Highland Farms Dairy v. Agnew**, supra:

> "The enforcement of that guaranty (Article 4, Section 4) according to the settled doctrine, is for Congress, not the Courts."

Justice Cardozo merely followed a long series of precedents so holding, and Mr. Chief Justice White in **Pacific States Telephone & Telegraph Company v. Oregon**, 223 U.S. 118, 56 L. Ed. 377 (1912) held that matters arising under the guaranty clause were nonjusticiable.

Mr. Chief Justice Hughes reiterated the same position in **Ohio ex rel. Bryant v. Akron Metropolitan Park District**, 281 U.S. 74, 74 L. Ed. 710 (1930). This case involved an Ohio statute creating park districts, upon presentation to a Probate Judge of a petition for creation of such a district. If the judge created a district, he then appointed three Commissioners who constituted the Board of Park Commissioners of the district. The Board had broad powers, including the power to levy taxes. Chief Justice Hughes stated that no federal question arose under Article 4, Section 4, saying:

> "As to the guaranty to every state of a republican form of government (Section 4, Article 4), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress, not the Courts."

Justice Brennan in his majority opinion in **Baker v. Carr**, 369 U.S. 186, 7 L. Ed. 2d 663 (1962) used the guaranty cases as one of the illustrations of nonjusticiability, pointing out that it was one of the examples of the political questions into which the Courts would not delve. **Baker v. Carr**, supra, stands for the proposition that the guaranty clause "is not a repository of judicially manageable standards which a court could utilize independently in order to identify a state's lawful government."

Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506 (1964) does not stand for the proposition that under certain circumstances such standards might exist under the guaranty clause. **Reynolds v. Sims** stands only for the proposition that compliance with a republican form of government, alone, may not necessarily assure compliance with the equal protection clause of the Fourteenth Amendment. As for the **Baker v. Carr** pronouncement that guaranty clause cases are nonjusticiable, no Supreme Court decision since has modified or reversed it.

B—**Petitioners Are Not Denied Equal Protection of the Laws by Virtue of the Method of Operation and Management of the Utility.**

The argument advanced by petitioners is substantially similar to that presented to and rejected by the Supreme Court in **Sailors v. Board of Education**, 387 U.S. 105, 18 L. Ed. 2d 650 (1967). In the Sailors case, a challenge was presented to the manner of selection of members of a county school board. The Court pointed out that the board members are chosen not by the electors of the county, but by delegates from local boards.

In upholding the manner of appointment, the Court stated:

> "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the Governor, by the legislature, or by some other appointive means rather than by an election."

Where the state law does not require such officers to be elected, the Court held that there is no requirement for the use of the one-man, one-vote principle. Such applicability arises only for elective, not appointive, office. The Court continued to point out:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here. If we assume arguendo that where a State provides for an election of a local official or agency—whether administrative,

legislative, or judicial—the requirements of Gray v. Sanders and Reynolds v. Sims must be met, no question of that character is presented. For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."

In upholding the lowering of the voting age from 21 to 18, the United States Supreme Court stated recently in **Oregon v. Mitchell**, 400 U.S. 112, 27 L. Ed. 2d 272 (1970):

"... it cannot be successfully argued that the Fourteenth Amendment was intended to strip the states of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."

Justice Black stated in this opinion:

"No function is more essential to the separate and independent existence of the states and their governments that the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices **and the nature of their own machinery for filling local public offices.**" (Emphasis supplied.)

The Fifth Circuit Court of Appeals recently quoted from the **Oregon v. Mitchell** case in **Harris v. Samuels**, 440 F. 2d 748 (5th Cir. 1971) in a denial of voter registration suit, concluding:

"In the matter of such importance to the states and their governments, a federal court should be slow to

intervene, but should, instead, avoid needless conflict with the administration by the state of its own affairs."

The principle of the Sailors case was recently applied in **Avens v. Wright**, 320 F. Supp. 677 (W. D. Va. 1970) where the Court held constitutional a Virginia statute which permitted the Courts to reapportion county districts and upon creation of additional districts, appoint supervisors to fill vacancies in the new districts. One of the attacks levied against the statute was that the judiciary could not constitutionally appoint supervisors. The Court rejected this argument, holding the plan constitutional, saying:

"The plaintiffs have suffered no constitutional wrong solely because the General Assembly, in exercising its authority to prescribe the manner for filling vacancies in public office has delegated the responsibility for selecting interim officers to the state courts."

This court recently decided a case somewhat analogous to the matter now before it in **Abate v. Mundt**, 403 U.S. 182, 29 L. Ed. 2d 399 (1971), in an opinion by Mr. Justice Marshall.

This Court upheld the constitutionality of a reapportionment plan. For 100 years Rockland County had been governed by a Board of Supervisors consisting of the supervisors of each of the counties' five constituent towns. Due to malapportionment a plan was submitted providing for a county legislature composed of 18 members chosen from five legislative districts corresponding in substance to the counties' five constitutent towns. Each district was allocated representatives in accordance with its population. Because of a total deviation of population of 11.9% the plan was attacked as being unconstitutional. This court upheld the plan, saying:

"In assessing the constitutionality of various apportionment plans, we have observed that **viable**

local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal standards or needs, Sailors v. Kent Board of Education, 387 U.S. 105, 110-111, 18 L. Ed. 2d 650, 654, 655, 87 S. Ct. 1549 (1967), and the desire to preserve the integrity of politicial subdivisions may justify an apportionment plan which departs from numerical equality."

The Fifth Circuit Court of Appeals recently considered a similar matter in **Dundee v. Orleans Parish Board of Supervisors of Elections**, 434 F. 2d 135 (5th Circ. 1970, reh. den.), wherein it was alleged that the Orleans Parish Board of Supervisors of Elections was malapportioned and that this consequently constituted invidious discrimination against plaintiff and others denying them equal protection of the laws. The District Court affirmed the charges and ordered reapportionment within a year. The Circuit Court affirmed and adopted the opinion of Judge Christenberry as its own. The Supreme Court affirmed solely on the basis that the rationale of **Sailors v. Board of Education**, supra, was inapplicable since the state selected to have its school people elected rather than selected in another manner.

In **Dahl v. The Republican State Committee**, 319 F. Supp. 682 (W.D. Wash. 1970), the lower court, however, applied the **Sailors** rationale holding that the election of state committeemen by county committeemen was proper and that the one man-one vote principle did not apply.

The Minnesota Supreme Court has recently had occasion to review the same type situation now before this Court in **Waters v. Putnam**, 183 N.W. 2d 545 (Minn. 1971). The occasion involved the creation and appointment of a Board of Managers for a water shed district in Minnesota. The managers were selected initially by the Min-

nesota Water Resources Board in its order creating the district. The Minnesota statute provided for subsequent appointment of managers by the counties concerned. Appellants argued that the manner of appointing managers denied them "equal and constitutional representation".

The Court, although pointing out that it need not decide constitutional issues because the procedural use of certiorari and mandamus had been improper, said:

> "Under the circumstances, the individual appellants are denied no representation since by statute the Board of Managers of the Water Shed District never stands for election. The first Board of Managers is appointed by the Water Resources Board; the subsequent managers are representatives and appointees of the County Boards . . . since the Managers are not the representatives of the individual taxpayers or residents, such persons are not beneficially interested in such representation . . ."
>
> "In all the reapportionment cases relating to political subdivision of the States, the United States Supreme Court has restricted the operation of the 'one-man, one-vote' rule to situations involving elective public bodies . . .
>
> "As a matter of law, the state legislature has broad discretion in determining the form of governments of public corporations and in delegating governmental power to such agencies . . ."

The equal protection arguments can be summed up thus:

(1) In municipal governmental situations involving special purpose districts—such as the Utility—the question of whether or not the officials thereof shall be elected or appointed is solely a matter for the state to determine.

(2) In the event the state chooses to have such officials elected, the applicable standard of one-man, one-vote applies so that the question of individual ratepayers' equal protection can properly be raised in the federal courts. **Hadley v. Junior College District**, 397 U.S. 50, 25 L. Ed. 45 (1970).

(3) There is no constitutional requirement, however, that the officials be elected.

(4) If the state chooses a method of appointing the officials of such special purpose municipal corporations, then the rule of one-man, one-vote does not apply and plaintiffs are not, as a matter of constitutional law, denied equal protection.

Cantwell has not been denied equal protection of the laws under the Fourteenth Amendment since the Indiana General Assembly has, and may constitutionally, created appointive officers for Utility districts. Cantwell's remedy, if any, lies before the legislature, not the Court.

It is therefore respectfully submitted that petitioners' writ for certiorari should be denied.

SMITH MORGAN & RYAN

By PATRICK J. SMITH

By JAMES R. McCLARNON
Attorneys for Respondents

SMITH MORGAN & RYAN
Suite 1900
One Indiana Square
Indianapolis, Indiana 46204
636-5401

APPENDIX

APPENDIX A

ACTS OF GENERAL ASSEMBLY 1929

Chapter 77

AN ACT supplemental to an act entitled "An act concerning municipal corporations," approved March 6, 1905.
[H. 132. Approved March 11, 1929.]

First Class Cities, Utilities Department.

Section 1. *Be it enacted by the general assembly of the State of Indiana,* First Class Cities, Utilities Department. In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporations," approved March 6, 1905, and acts amendatory thereof, there is hereby created in any such city having a population of not less than three hundred thousand (300,000), as shown by the last preceding United States census, a department of public utilities, which shall be under the control of a board of seven (7) members, to be known as the "board of directors for utilities," to be appointed annually by the board herein provided for and designated as the board of trustees for utilities. Said board of trustees for utilities shall consist of five (5) members. Two (2) of said board of trustees for utilities shall be chosen and appointed by the mayor of such city of the first class, and two (2) of whom shall be appointed by the mayor on nomination of the judge of the circuit court of the county in which such city is situated; one (1) of whom shall be appointed by the mayor on nomination of the city council. Not later than sixty (60) days after this act becomes effective, or in the case of cities hereafter falling within the classifica-

tion prescribed, sixty (60) days after the publication of the United States census establishing such population, the common council of such city, and the judge of the circuit court of the county in which said city is located, shall transmit in writing to the mayor of such city of the first class their respective nominations of members of said board of trustees for utilities, and the mayor shall appoint such nominees to membership on such board not later than ten (10) days after the expiration of said sixty (60) day period, and at the same time such mayor shall appoint the two members to be chosen by himself. In such original appointments of members to be chosen by the mayor, one shall be appointed for a period of three (3) years and one for a period of four (4) years from the date of such appointment; the trustee nominated by the city council shall be appointed for the period of two (2) years from the date of such appointment; of the two to be nominated by the judge of the circuit court, one shall be appointed for a period of one (1) year, and one for a period of four (4) years. At the expiration of the respective terms of the members of the board of trustees so appointed, the mayor shall appoint successors to membership on such board, such succeeding members to be nominated in the method and by the same authorities as herein provided for nominating the first members of such board of trustees, and all such appointments shall be for the period of four (4) years. Notice in writing shall be given by the mayor to the judge of the circuit court entitled to submit nominations not more than sixty (60) and not less than thirty (30) days before the date at which a new appointment should be made, and if within twenty-five (25) days after the receipt of such notice, the authority in whom is vested the right to make nominations fails to transmit in writing to the mayor such nomination, the mayor shall thereupon choose such member on his own initiative. In event any person designated as a member of such board of trustees

shall fail to qualify within ten (10) days after the notice of his appointment, or if any member after qualifying shall die, resign, or be removed as hereafter provided, new members of such board of trustees shall be chosen in the same manner as is provided for the member as to whom such vacancy occurs, and any such substituted appointee shall be appointed for the remainder of the term for which the original member whose place is so filled was appointed.

No person shall be appointed as a trustee who is less than thirty-five (35) years of age, and who has not been a resident of such city for at least five (5) years immediately preceding his appointment. If any such trustee shall cease to be a resident of said city his membership on said board shall end.

Each member of such board of trustees for utilities, before entering upon his duties, shall take and subscribe an oath of office in the usual form, to be endorsed upon the certificate of his appointment, which shall be promptly filed with the city clerk.

A majority of all the members of said board of trustees for utilities shall be necessary to constitute a quorum, and no member of the board of directors for utilities shall be appointed by said board of trustees unless he receive the vote of a majority of all the members of said board of trustees.

It shall be the duty of said board of trustees for utilities to appoint the members of the board of directors for utilities.

Said board of trustees shall meet within thirty (30) days after their first appointment at a time and place to be designated by the mayor of said city, for the purpose of organization and to appoint the first board of directors for utilities.

Said board of trustees shall elect one member thereof as president, one as vice-president and one as secretary, who shall serve from the date of their election until one year from the first day of January next following their election and until their successors are elected and qualified.

Said board of trustees shall keep a record of their proceedings. The expense of the meetings and proceedings of said board and of keeping a record thereof and the salary of the members thereof shall be paid upon the written request of the presiding officer and secretary thereof by the board of directors for utilities out of the funds belonging to said utility district. Each member of said board of trustees for utilities shall receive as compensation for his services as such a salary in the sum of fifty dollars ($50) per year.

At said first meeting after organizing as aforesaid, said board of trustees shall appoint the seven members of said board of directors for utilities, who shall serve for one year from the first day of January next following their appointment, and until their successors are elected and qualified.

After said first appointments of the board of directors are made the board of trustees for utilities shall meet annually on the first Monday of December of each year after the first year, at the principal office of said department of utilities, for the purpose of electing officers and for the purpose of appointing members of the board of directors for utilities, who shall serve for one year from the first day of January following and until their successors are appointed and qualified.

No person shall be appointed a member of said board of directors for utilities unless he be a bona fide resident of said city and has been such for the five (5) years immediately preceding such appointment, and is at least thirty-five (35) years of age. If any such director shall cease to

be a citizen of said city during the term for which he was appointed his term shall immediately end.

Each member of said board of directors for utilities before entering upon his duties, shall take and subscribe an oath, to be endorsed upon the certificate of his appointment, which shall be promptly filed with the city clerk.

Each of said members of said board of directors, before entering upon his duties shall execute a bond payable to the State of Indiana, with surety to be approved by the mayor of said city, in the penal sum of fifteen thousand dollars ($15,000), conditioned upon his faithful performance of the duties of his office and the accounting for all moneys and property that may come into his hands or under his control. The cost of all such bonds shall be paid by the department of utilities of said city.

If a vacancy occurs in said board of directors from any cause said board of trustees shall appoint a successor who shall serve for the balance of the term for which the member whose place is so filled was appointed.

Any trustee or director may be removed from office by the mayor for neglect of duty, incompetency, or other good cause, but only after a hearing before such mayor upon written charges preferred against such trustee or director. Such charges may be filed with the mayor, and the trustee or director against whom the same are directed shall have at least ten (10) days' notice of the place and time of hearing thereon, and shall have opportunity to produce evidence and examine and cross-examine witnesses. All testimony shall be given under oath. The finding of the mayor shall be reduced to writing by him and filed with the city clerk. If such charges are sustained and such trustee or director removed, he may take an appeal from such finding within ten (10) days after the date of filing of the same with the clerk, to the circuit court or superior court of the county in which such city is located. He shall, in such

court, file an original complaint against such mayor, setting forth the charges preferred and the finding made thereon. Such court shall hear the matter of such appeal within thirty (30) days after the filing of the same, without the intervention of a jury, and shall ratify or reverse the finding of said mayor, and the judgment of said court shall be final and no appeal shall lie therefrom.

Organization of Board of Directors

Sec. 2. Organization of Board of Directors. Not later than thirty (30) days after the first members of any such board of directors are appointed, and annually thereafter, the members of such board of directors for utilities shall hold a meeting for the purpose of organization. They shall choose one of their members president, another vice-president, another secretary, and another treasurer, who shall perform the duties usually pertaining to those offices. Such officers first so chosen shall serve from the date of their election until one year from the first day of January following their election, or until their successors are duly elected and qualified. Thereafter said board of directors at their annual meeting on the second Monday of January shall elect such officers for the ensuing year.

The members of such board of directors for utilities shall each be paid a salary for their services as such directors at the rate of six hundred dollars ($600) per annum during the period of service. A majority of the members of said board of directors shall constitute a quorum, and the concurrence of a majority of such membership shall be necessary to any action of such board. Such board of directors shall hold an annual meeting on the second Monday of January of each year, at the general offices of such board, and such other regular meetings at such times as it may determine, and upon such notice as it may fix, by rule or regulation. It shall be authorized to make such by-laws

and regulations as it may deem necessary for the safe, economical and efficient management and protection of the properties intrusted to its care. Such board of directors shall require any officer or employee having custody of funds to give bond in such reasonable amount as the board may prescribe, the expense of which bonds shall be paid by the department fo public utilities of such city.

Powers and Duties of the Board of Directors

Sec. 3. Powers and Duties of the Board of Directors. The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water works, gas works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may hereafter acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all necessary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said board of directors is desirable or necessary for. the proper serving of the inhabitants of said city and the adjacent community served with respect to any such utility from any such plant or plants. In connection with the duties devolving upon such board of directors as aforesaid, it shall have power as follows:

(1) To condemn, appropriate, lease, rent, purchase and hold any real estate, rights of way, materials or personal property within such city or within five (5) miles of the corporate limits thereof, needed for the proper giving of service by any such utility to the inhabitants of said city and the community contiguous thereto and served from any such utility plant.

(2) To design, order, contract for and construct any and all necessary or desirable extensions of or additions to any utility plant and property owned by said city, and to enter into all necessary contracts with reference thereto, and with reference to the purchase of materials and supplies needed for the operation of any such plant or plants, in accordance with such rules and regulations as may be adopted by such board of directors, and without the necessity of advertising for bids, or without such other restrictions as are now imposed by any law of the State of Indiana with reference to the letting of contracts for work, material or supplies by municipal bodies or other governmental agencies.

(3) To sell any products or by-products, and enter into executory contracts for the sale thereof without any restriction concerning taking of bids therefor or otherwise, except in so far as relates to the sale to the public of a public utility service and the necessity of submitting the rates to be charged for such service to the public service commission of the State of Indiana.

(4) To operate any such plant or plants, to receive and collect all moneys due on account of such operation or otherwise relating to such plant or plants or business, and in connection therewith to employ such managers, superintendents, assistant managers, assistant superintendents, engineers, attorneys, auditors, clerks, foremen, and other employees, as may be deemed necessary for the proper carrying on and operation of any such utility plant or plants, and to fix the compensation of any such employee: *Provided, however,* That no contract of employment shall be made for a longer period than four (4) years. Said directors shall have power to elect from their membership an executive committee consisting of not more than three (3) who shall in the intervals between the meetings of said directors exercise all the powers and duties of said directors, all of their acts to be subject, however, to the

approval of said directors, and to fix and pay such additional compensation to the members of said executive committee, in addition to their salaries as directors, as shall be reasonable. Said additional compensation shall be fixed by a resolution of said directors entered of record at the time of the appointment of said executive committee.

(5) To rent such offices for the conduct of the business of such utility or utilities as may be deemed needful, and enter into contracts with reference to the rental thereof: *Provided, however,* That no such contract shall be made for a longer period than ten (10) years.

(6) In event there be any open mortgage upon any utility property acquired by any such city, by the terms of which mortgage additional bonds may be taken down from the trustee under such mortage to meet, in whole or in part, the cost of extensions and improvements to the mortgaged property, said board of directors shall have power and authority to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such property; and, subject to the approval of the public service commission of Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such property.

(7) To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, and to take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom; and in event there be any oustanding open mortgage upon

the property covered by any such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such lease property; and, subject to the approval of the public service commission of Indiana, to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such leased property.

(8) To preserve the corporate organization of any company engaged in the mining of coal, or any other commercial or manufacturing business, the stock of which may be owned by any utility whose property and assets may be taken over by any such city; and in connection therewith to cause the stock of any such company to be issued in the name of said board of directors for utilities except as to qualifying shares for directors, and to cause such qualifying shares to be issued in the names of such individuals as said board of directors may name; and thereupon to vote any such stock for the election of directors, who may be members of such board of trustees for utilities: *Provided, however,* That no member of such board of directors shall receive any compensation, directly or indirectly, as a director, officer or employee of any such company, other than the compensation herein provided as a member of the board of directors for utilities. Through the control thus given of any such company, the board of directors for utilities shall be authorized to do all things necessary to cause any such coal mining or other company efficiently to carry on its operations and to conduct its business in the same manner as if its stocks were owned by private individuals.

(9) To prescribe rules for service and rates for service in connection with the furnishing of any public utility service by said city to consumers: *Provided,* That any such rules and rates for service shall be in full force and effect only after the same have been filed with and approved by the public service commission of Indiana, to the extent that such filing and approval are required under the laws of the State of Indiana.

(10) To take over all contracts and rights of any kind or character, and to fulfill and perform all obligations relating to the property and business of any utility company whose property may be taken over by any such city.

Trustees' and Directors' Interest in Contracts.

Sec. 4. Trustees' and Directors' Interest in Contracts. No contract shall be made for the purchase or sale of any materials or supplies on behalf of said board of directors for utilities with any trustee or director, and no trustee nor director shall have any pecuniary interest in any such contract.

Board's Right of Action.

Sec. 5. Board's Right of Action. The board of directors for utilities in every such city may, in the name of the city, bring any such action which it deems proper in order to protect the property rights of said city with reference to any such utility property so under the control of such board, or to secure the more effective carrying out of the purposes of this act with reference to the erection, maintenance and operation of any such utility property or properties.

Utility District.

Sec. 6. Utility District. Upon the taking effect of this act and the organization of such board of directors for utilities, as hereinbefore provided, all of the territory in-

cluded within the corporate limits of any said city shall become and constitute a utility district for the purpose of providing for the furnishing of utility service in such lines for utility operation as may be taken over or owned by said city, and thereafter said utility district shall be deemed duly created and established under and pursuant to the provisions of this act.

Expense, Temporary Payment.

Sec. 7. Expense, Temporary Payment. All preliminary expenses actually incurred by such board of directors in providing necessary records, the employment of clerks, engineers, attorneys and other employees, the making of surveys, and all other expenses of whatsoever nature necessary to be paid prior to the actual taking over and operation of any utility plant and the collection of revenues therefrom, shall be met and paid in the following manner: Said board of directors for utilities shall from time to time certify such items of expense to the controller of such city, directing him to pay the several amounts thereof, and thereupon said controller shall at once draw his warrant or warrants upon the city treasurer, which warrant or warrants shall be paid out of the general funds of such city not theretofore appropriated, without a special appropriation being made therefor by the common council; or in case there are no such general funds of said city not otherwise appropriated, the city controller shall recommend to the common council the temporary transfer of other funds of such city as is necessary to meet such items of expense, or the making of a temporary loan for such purpose, and such common council shall thereupon at once make such transfer of funds or authorize such temporary loan in the same manner that other temporary loans are made by such city: *Provided, however,* That the fund or funds of such city from which such payments are made shall be fully reimbursed and repaid with six per cent interest by such board

of directors for utilities out of the first receipts from the operation of any such utility by said board which are not needed to defray current operating expenses and the expenses of imperative betterments.

Utility District Bonds.

Sec. 8. Utility District Bonds. For the purpose of raising money to pay for the acquisition of any utility property which said city shall have the right to and shall determine to acquire, including any money required to be paid for the purpose of redeeming or extinguishing the capital stock of any utility whose property may be so taken over and for the purpose of paying any outstanding obligations of any utility company subject to which the property of any such utility may be taken over by any such city, or for the purpose of making necessary betterments, improvements, extensions or additions to any utility property owned by said city, the board of directors for utilities shall cause to be issued in the name of the said city the bonds of said utility district not to exceed in amount the total cost of any such utility so purchased, and for the outstanding obligations of any utility subject to which the property is to be taken over and which it is desired to pay off and discharge and/or of any such additions, betterments, improvements, extensions or additions to any utility owned by said city, and including all expenses necessarily incurred in connection with the acquisition of any such property, the paying off of any such indebtedness or the making of any such improvements, extensions or additions thereto. Such bonds shall be issued in any denominations not more than one thousand dollars ($1,000) each, and shall be payable at such period not longer than thirty (30) years after date, and in such series or series as such board of trustees may by resolution determine. Said bonds shall be negotiable as inland bills of exchange, and shall bear interest at a rate not exceeding six per centum (6%) per annum, payable semiannually.

On adopting a resolution ordering said bonds, said board of directors shall certify a copy of the same to the city controller of said city, who shall thereupon prepare said bonds, and the same shall be executed by the mayor of said city and attested by the city controller. Such bonds shall be exempt from taxation for any and all purposes. All of said bonds so issued by the board of directors shall be sold by the city controller to the highest bidder therefor, but in no event for less than par, after giving notice of sale of such bonds by publication in two newspapers of the largest general circulation printed and published in the city where said bonds are sold, which publication shall be made not less than fifteen (15) days prior to the date fixed for the sale of said bonds. Any bonds issued pursuant to the provisions of this act shall be valid and binding without obtaining the approval of the public service commission of Indiana or the state board of tax commissioners of the State of Indiana. It shall be unlawful for said board of directors for utilities to cause to be issued under this act any bonds of said utility district payable by special taxation when the total issue for that purpose, including the bonds already issued and outstanding and those proposed to be issued, is in excess of one per centum (1%) of the total assessed valuation (after deducting all mortgage exemptions) of the property within said utility district, and all bonds or obligations issued in violation of this provision shall be void. Said bonds shall not in any respect be a corporate obligation or indebtedness of said city, but shall be and constitute an indebtedness of said utility district as a special taxing district, and said bonds and interest thereon shall be payable only out of a special tax levy upon all of the property of said utility district, or from surplus earnings as in this act provided; and said bonds shall recite such terms upon their face, together with the purpose for which they are issued. No suit to question the validity of said bonds so issued for said utility district or to prevent their issue and sale shall

be instituted after the date set for the sale of said bonds, and all said bonds from and after said date shall be incontestable for any cause whatsoever.

In event any such city shall, pursuant to any contract right so to do, determine to take over the property and business of any utility company by the payment to it of the amount necessary to pay off the stock of such company, the proceeds of any such utility district bonds issued and sold as herein provided may, so far as is necessary, be paid over to any such utility company at the time of the conveyance of its property, for the purpose of enabling such company to discharge its obligations to its stockholders in accordance with the provisions of any such contract.

Utility District Bond Fund

Sec. 9. Utility District Bond Fund. All proceeds from the sale of said bonds under and pursuant to section 8 of this act shall be kept as a separate and specific fund to pay the cost of the acquisition of any utility property which said city shall have the right to and shall determine to acquire or the payment of obligations of any such utility subject to which its property is purchased, or the cost of making necessary betterments, improvements, extensions or additions to any utility property owned by said city, as hereinabove provided, and no part of the same shall be used for any other purpose whatsoever. Such funds shall be deposited at interest with the depositary or depositaries of other public funds of such city, and all interest collected therefrom shall belong to such fund. Any surplus of funds remaining out of the proceeds of said bonds after all of said costs and expenses are fully paid shall be paid into and become a part of the utility district bond fund as hereinbefore referred to.

Tax Levy

Sec. 10. Tax Levy. For the purpose of raising money to pay all bonds issued as provided in section 8, and the interest thereon, to the extent that moneys are not available therefor in the judgment of the board of directors for utilities from the operations of said utility plant or plants so owned by said city, the board of directors for utilities as an official board of said utility district, is hereby empowered to levy, and shall levy each year, a special tax upon all the property of said utility district in such manner as to meet and pay the principal of said bonds as they severally mature, together with all accruing interest thereon. Said board of directors shall cause said tax so levied each year to be certified to the city controller of said city and the auditor of the county in which said utility district is located, on or before the first day of October of each year. Such tax so levied and certified shall be estimated and entered upon the tax duplicate by the auditor, and shall be collected and enforced by the county treasurer in the same manner as state and county taxes are now estimated, entered, collected and enforced; and as such tax is so collected by the county treasurer it shall be accumulated and kept in a separate fund to be known as the "utility district bond fund," and shall be applied to the payment of the aforesaid utility district bonds and interest as they severally mature, and for no other purpose whatsoever: *Provided*, That all accumulations of said fund prior to their use for the payment of such bonds and interest shall be deposited, at interest, with the depositary or depositaries of other public funds in such city, and all interest collected thereon shall belong to such fund.

Application of Surplus Earnings

Sec. 11. Application of Surplus Earnings. Within sixty (60) days after the end of each calendar year, if there be at the time any bonds outstanding issued on account of

said utility district, said board of directors for utilities shall cause any surplus earnings from the operation of any such utility or utilities during the preceding calendar year, which are not necessary to provide for current operating expenses and such reserve funds as may be necessary in the opinion of such board of directors to provide against possible unfavorable results from operation, or to provide for contemplated betterments, extensions, improvements or additions, to be paid over to the county treasurer, ex officio city treasurer, and to be added to and to become a part of said utility district bond fund, and to be used for the same purposes and in the same manner as funds derived from levy of taxes as in this act heretofore provided. In event there are no such utility district bonds at the time outstanding, then any such surplus operating revenues not needed for the purposes aforesaid shall be paid over to and become a part of the general funds of said city.

Said board of directors may secure temporary loans for a period not exceeding ninety (90) days and at rates of interest not exceeding six per cent for the use of said utility district whenever in the judgment of said board a necessity exists therefor in conducting the business of said district, providing a resolution declaring such necessity is first adopted and recorded upon the records of said board, and said board is authorized to execute notes or other evidences of indebtedness which shall bind said utility district to the repayment thereof.

Application of Current Receipts

Sec. 12. Application of Current Receipts. The current receipts and all other moneys derived from the operation of any such utility property shall be expended by said board of directors upon vouchers in a form to be determined by them, and any such funds shall be deposited in such bank or banks as may be determined by said board to

the credit of said board of directors for utilities, and any interest earned on any such deposits shall be added to the principal thereof. No appropriation in any form shall be necessary for the expenditure of any of such current income or for the expenditure of the proceeds of any sale of bonds as hereinbefore authorized, but all funds arising under the provisions hereof shall be deemed appropriated for the respective purposes herein named and shall be under the control of the board of directors for utilities as herein provided, and said board of directors shall have full, complete and exclusive authority to expend such funds for the purposes herein provided.

Utility Records.

Sec. 13. Utility Records. In event more than one utility property is operated by said board of directors, separate books of account and records shall be kept for each utility, and the funds of each shall be kept segregated.

Current Reports.

Sec. 14. Current Reports. The board of directors for utilities shall make quarterly accounting and reports to the city controller of such city, of all funds received and expended by it, and not less than sixty (60) days after the end of each calendar year the city controller shall make publication in not less than two newspapers of general circulation printed and published within said city of the material facts as set forth in the report of said board of directors for the preceding calendar year.

Application of Provisions of City Manager Form of Government.

Sec. 15. Application of Provisions to City Manager Form of Government. In event any city of the first class to which this act is applicable shall have adopted or shall

hereafter adopt the city manager plan of government, and pursuant thereto shall have elected or shall elect commissioners, and such commissioners shall have chosen or shall choose a city manager pursuant to the provisions of the act of the general assembly of the State of Indiana entitled "An act to provide alternative forms of government for cities adopting the same," approved March 10, 1921, and all acts supplementary thereto or amendatory thereof, all references in this act to the city council, or mayor, of any such city shall be deemed to refer to the commission and city manager respectively of any such city, and any and all powers and duties granted to or imposed upon such city council or mayor shall be deemed to create like powers and duties upon such commission and city manager, Wherever reference is made in this act to the city controller, the reference thereto in the case of any such city adopting the city manager form of government shall be deemed to refer to such officer as shall perform the duties now performed by the city controller.

Liberal Construction.

Sec. 16. Liberal Construction. This act being necessary for and intended to secure the efficient and economical management of utility properties in any city of the first class taking advantage of the provisions hereof, the same shall be liberally construed to effectuate the purpose hereof, and if any one or more sections or provisions of this act shall be held invalid the remaining sections and provisions hereof shall not be affected thereby.

Budget Law Inapplicable.

Sec. 17. Budget Law Inapplicable. The provisions of chapter 95 of the Acts of 1927 of the general assembly of Indiana, commonly known as the budget law, shall not

apply to the board of directors created by this act but such board of directors shall annually on or before the 31st day of December, furnish to the city controller an estimate of the moneys to be expended by them for the succeeding calendar year.

Books, Accounts, Records, Transactions.

Sec. 18. The books, accounts, records and transactions of said utility district and of the board of directors thereof shall be subject to examination, audit and supervision by the state board of accounts to the same extent as the books, accounts, records and transactions of other municipal governments or officers or departments of municipal governments are subject thereto.

Repeal.

Sec. 19. Repeal. All laws and parts of laws in conflict with this act are hereby repealed.

Emergency.

Sec. 20. Emergency. Whereas an emergency exists for the immediate taking effect of this act, therefore, the same shall take effect and be in force from and after its passage.

CHAPTER 78.

AN ACT relating to corporations organized before May 1, 1913, for the purpose of furnishing gas for fuel or illuminating purposes, or electric lights or water, or light, heat and power to any town or city or the citizens or inhabitants thereof, and the articles of incorporation of which provide for the transfer of the property of such corporation to such town or city, legalizing certain provisions in the articles of incorporation thereof and authorizing the conveyance of the property of such corporations to such towns or cities and authorizing such towns or cities to accept such conveyance, repealing all laws in conflict therewith and declaring an emergency.

[H. 133. Approved March 11, 1929.]

Gas Corporations, Certain—Conveyance of Property to Municipality—Retirement of Stock.

Section 1. *Be it enacted by the general assembly of the State of Indiana,* That if in the original articles of incorporation of any corporation organized under the laws of this state prior to May 1st, 1913 (that being the date of the creation of the public service commission of this state), for the purpose of furnishing natural or artificial gas for fuel or for illuminating purposes, or for furnishing electric lights or water to the citizens of any town or city within this state, or to furnish light, heat and power to any town or city, or the inhabitants thereof, provision is made for the transfer or conveyance of the property of such corporation to such town or city, subject to the outstanding legal obligations of said corporation, whenever the holders or owners of shares of stock, stock certificates or holders or owners of any beneficial interest in such capital stock shall have received the face or par value of such shares of stock, stock certificates or beneficial interest, together with the interest or dividends thereon provided for in such articles of incorporation, such provision in such articles shall be, and is hereby legalized and declared to be valid and binding upon such corporation and

upon the holders and owners of any such shares of stock, stock certificates or beneficial interest therein or their assigns, and said town or city shall be authorized and entitled to accept a transfer and conveyance of any such property in accordance with the terms and conditions of such articles of incorporation, without the question of the acceptance or acquisition of such property being submitted to a vote of the electors of such town or city and without any election being held therein to determine whether such property shall be acquired by such town or city. It shall not be necessary to obtain the consent or approval of the public service commission of Indiana or any other state board, commission or officer for such transfer and conveyance or of the terms and conditions upon which the same is to be made, but such transfer and conveyance shall be valid without any order or approval of such commission, board or officer, and any provisions in such articles authorizing the board of directors, trustees or other officers of said corporation to issue bonds or to mortgage or otherwise encumber such property before such transfer and conveyance for the purpose of borrowing money with which to pay to such holders or owners of such shares of stock, stock certificates or owners of such beneficial interest thereof the face or par value of such shares of stock, stock certificates, together with the interest on dividends provided for in such articles, and authorizing such directors, trustees or other officers to transfer or convey the property of such corporation to such town or city whenever the holders or owners of the shares of stock, stock certificates or any beneficial interest therein have been paid the par or face value of such shares of stock or stock certificates together with the interest or dividends provided for, are hereby legalized and declared to be valid and binding and such directors, trustees or other officers of such corporation shall have the right and power to carry out and perform any such

provisions in accordance with the terms of such articles. This act shall apply to any such corporation if organized before May 1, 1913, and in which the aforesaid provisions are contained in the articles of incorporation and which articles have thereafter been amended and in which such amended articles of incorporation such provisions are contained.

Any provisions in either the original articles of incorporation of any such corporation, or in any amendment thereof, providing for the retirement of the outstanding preferred stock of such corporation before such conveyance is made to any such municipal corporation are hereby legalized and declared valid and binding and said corporation and the officers thereof are authorized to retire such stock in accordance with such provisions and the terms of such preferred stock, and to mortgage such property to secure funds with which to redeem such preferred stock and to pay the holders and owners of the shares of common stock or common stock certificates or of any beneficial interest therein the amounts provided for in such articles, and whenever the outstanding preferred stock in any such corporation shall have been redeemed and the holders and owners of such common stock, common stock certificates or of any beneficial interest therein shall have received the amounts therein provided for in such articles of incorporation, then the property of such corporation shall be conveyed to such municipal corporation in accordance with the provisions of such articles or amended articles of incorporation.

Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city the title to such property shall vest in such town or city, subject to all outstanding legal obligations of said corporation: *Provided, however,* That such town

or city shall not be liable for any such obligations and the same shall not constitute a debt of such town or city, but all such obligations shall be a charge upon said property so conveyed, and any mortgage or other lien or encumbrance executed by the board of directors, trustees or other authorized officers of such corporation before such transfer shall continue to be a lien on such property to the same extent as before such transfer or conveyance.

Said municipal corporation shall be authorized to accept, hold and own all the property of such corporation so transferred to it, including that located within this state and that located in any other state and any shares of stock or other interest in any other corporation of which said corporation making such transfer shall be the owner, and any right, title or interest such transferring corporation may have in any lease upon other property.

Provided, however, That if in any such municipal corporation there is now or is hereafter created or existing a separate taxing unit or district which shall be subject to taxation to raise money with which to either retire or redeem the stock of any such transferring corporation, or to pay obligations incurred for the benefit of such property, then all such property so transferred to such municipal corporation shall be held thereby in trust for the use and benefit of such separate taxing unit or district, and for the general public.

Repeal.

Sec. 2. That all laws and parts of laws in conflict herewith are hereby repealed.

Emergency.

Sec. 3. An emergency existing for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.

APPENDIX B

INDIANA CODE, 1971

DEPARTMENT OF PUBLIC UTILITIES—CITIES OF FIRST CLASS

Section.

48-7101. Department created—Board of directors—Board of trustees.

48-7102. Board of directors—Organization.

48-7103. Board of directors—Jurisdiction—Duties and powers.

48-7104. Trustees' and directors' interest in contracts.

48-7105. Board of directors—Right of action.

48-7106. Utility district.

48-7107. Preliminary expenses—payment.

48-7108. Bonds of utility district—Certificates of indebtedness.

48-7109. Bonds—Disposition and use of proceeds.

48-7110. Bonds—Tax levy.

48-7111. Bonds—Application of surplus earnings.

48-7112. Current receipts—Disposition—Expenditures.

48-7113. Utility records.

48-7114. Current reports.

48-7115. Board of directors free from control of state board of tax commissioners—Liberal construction—Provisions severable.

48-7116. Budget Law inapplicable.

48-7117. Books, accounts, records, transactions.

48-7118. Application of act.

48-7119. Bonds—Payment—Plant revenue—Recitals in bonds—Maturity—Interest—Procedure — Validity — Sale —Notice of—Proceeds of sale—Mortgage to secure.

48-7120. Purchase of public utilities.

48-7121. Operation of public utilities.

48-7122. Services furnished city—Payment.

48-7123. Property tax on city-owned utilities.

48-7101 [10988.1] Department created—Board of directors—Board of trustees.—In addition to the existing executive departments of cities of the first class, as such cities are defined in an act entitled "An act concerning municipal corporation[s]," approved March 6, 1905, and acts amendatory thereof and supplemental thereto, there is hereby created in any such city having a population of not less than three hundred thousand [300,000], as shown by the last preceding United States census, a department of public utilities, which shall have as its head and be under the general supervision and control of a board of seven [7] members, to be known as the "Board of Directors for Utilities," to be appointed annually by the board herein provided for and designated as the "Board of Trustees for Utilities."

BOARD OF TRUSTEES—MEMBERS—APPOINTMENT—TERMS

Said board of trustees for utilities, as originally constituted, shall consist of five [5] members, two [2] of whom shall be chosen and appointed by the mayor of such city of the first class; two [2] of whom shall be appointed by the mayor on nomination of the judge of the circuit court of the county in which such city is situated; and one [1] of whom shall be appointed by the mayor on nomination of the city council. Not later than sixty [60] days after this act becomes effective, or in the case of cities hereafter falling within the classification prescribed, sixty [60] days after the publication of the United States census establishing such population, the common council of such city, and the judge of the circuit court of the county in which said city is located, shall transmit in writing to the major of such city of the first class their respective nominations of members of said board of trustees for utilities, and the mayor shall appoint such nominees to membership on such board not later than ten [10] days after the expiration of said sixty [60] day period, and at the same time such

mayor shall appoint the two [2] members to be chosen by himself. In such original appointments of members to be chosen by the mayor, one [1] shall be appointed for a period of three [3] years and one [1] for a period of four [4] years from the date of such appointment; the trustees nominated by the city council shall be appointed for a period of two [2] years from the date of such appointment; of the two [2] to be nominated by the judge of the circuit court, one [1] shall be appointed for a period of one [1] year, and one [1] for a period of four [4] years.

All such trustees and all successors thereof shall hold over after the expiration of their terms until their respective successors have been duly appointed and have qualified.

BOARD OF TRUSTEES—EXPIRATION OF TERMS —NOMINATION FOR NEW TERMS—PROCEDURE

At the expiration of the respective terms of each of the members of the board of trustees so originally appointed, the said board of trustees shall nominate the successors thereof to membership on such board, each of which nominees shall be appointed by the mayor within ten [10] days after receiving such nominations, and such succeeding members shall serve for a term of four [4] years. In the event any person who has been appointed at any time within ten [10] days after the mailing to him of notice of his appointment; or if any member after qualifying shall die, resign, vacate such office by becoming a nonresident of such city, or be removed as hereinafter provided; new members of such board of trustees shall be chosen to fill such vacancy in the same manner as is provided for the member as to whom such vacancy occurs, and the member so chosen shall serve for the remainder of the term for which the member whose place is so filled was appointed.

BOARD OF TRUSTEES—QUALIFICATION OF MEMBERS—ORGANIZATION—COMPENSATION

No person shall be appointed as trustee who is less than thirty-five [35] years of age, and who has not been a resident of such city for at least five [5] years immediately preceding his appointment. If any such trustee shall cease to be a legal resident of said city his membership on said board shall thereby terminate and become vacant.

Each member of such board of trustees for utilities, before entering upon his duties, shall take and subscribe an oath of office in the usual form, to be indorsed upon the certificate of his appointment, which shall be promptly filed with the city clerk.

A majority of all the members of said board of trustees for utilities shall be necessary to constitute a quorum.

Said board of trustees shall meet within thirty [30] days after their first appointment, at a time and place designated by the mayor of said city, for the purpose of organization and to appoint the first board of directors for utilities.

Said board of trustees shall elect one [1] member thereof as president, one [1] as vice-president, and one [1] as secretary, who shall serve from the date of their election until one [1] year from the first day of January next following their election and until their successors are elected and have qualified.

Said board of trustees shall keep a record of their proceedings. The expense of the meetings and proceedings of said board and of keeping a record thereof and the salary of the members thereof shall be paid upon a written request of the presiding officer and secretary thereof by the board of directors for utilities out of the funds belong-

ing to said utility district. Each member of said board of trustees for utilities shall receive as compensation for his services as such a salary in the sum of fifty dollars [$50.00] per year.

BOARD OF DIRECTORS FOR UTILITIES —NUMBER—APPOINTMENT

At said first meeting after organizing as aforesaid, said board of trustees shall appoint the seven [7] members of said board of directors for utilities, who shall serve for one [1] year from the first day of January next following their appointment, and until their successors are elected and have qualified.

BOARD OF TRUSTEES—ANNUAL MEETING

After said first appointments of the board of directors are made the board of trustees for utilities shall meet annually on the first Monday of December of each year after the first year, at the principal office of said department of utilities, for the purpose of transacting any business pertaining to their duties, and for the purposes of electing officers of such board of trustees and of selecting and appointing members of the board of directors for utilities, who shall serve for one [1] year from the first day of January following and until their successors are appointed and qualified.

BOARD OF DIRECTORS—MEMBERS—HOW SELECTED—QUALIFICATIONS—TERMS

All persons so selected and appointed as such directors and all the successors thereof appointed at any time shall be chosen by a majority vote of all the members of said board of trustees. Said board of trustees shall have power to remove summarily and at any time any director and in

such event, or if a vacancy occurs in said board of directors from any cause, said board of trustees shall appoint a successor in like manner who shall serve for the balance of the term for which the member whose place is so filled was appointed.

No person shall be appointed a member of said board of directors for utilities unless he is a bona fide resident of said city and has been such for five [5] years immediately preceding such appointment, and is at least thirty-five [35] years of age. If any such director shall cease to be a legal resident of said city during the term for which he was appointed, his membership on such board shall thereby terminate and become vacant.

BOARD OF DIRECTORS—OATH

Each member of said board of directors for utilities before entering upon his duties shall take and subscribe an oath, to be indorsed upon the certificate of his appointment, which shall be promptly filed with the city clerk.

BOARD OF DIRECTORS

Each of said members of said board of directors, before entering upon his duties, shall execute a bond payable to the State of Indiana, with surety to be approved by the mayor of said city, in the penal sum of fifteen thousand dollars [$15,000], conditioned upon the faithful performance of the duties of his office and the accounting for all moneys and property that may come into his hands or under his control. The cost of all such bonds shall be paid by the department of utilities of said city.

TRUSTEES—REMOVAL FROM OFFICE—PROCEDURE

Any trustees may be removed from office for neglect of duty, incompetency, disability to perform his duties, or

other good cause, by an order and judgment of the circuit or superior court of the county in which such city is located, in the following manner, to wit: An original complaint may be filed by either the mayor, or by a majority of the common council of such city against any such trustee setting forth the charges preferred, and the cause shall be placed on the advanced calendar and be tried as other civil causes are tried, by the court, without the intervention of a jury. If such charges be sustained, the court shall declare such office vacant. The judgment of said court shall be final and no appeal shall lie therefrom by any party.

TRUSTEES—RULES AND REGULATIONS—BY-LAWS

Said board of trustees shall have power to adopt rules, regulations and by-laws for their own governance, and may meet regularly or specially as often as necessary to transact any business or duties imposed upon them under this or any other act.

TRUSTEES—ADDITIONAL MEMBERS

In the event such city shall acquire in any manner herein provided more than one [1] such public utility and the property thereof, said board of trustees may add to such board of directors from time to time one [1] or more additional members, increasing such board to not exceed a total of eleven [11] members; which members shall be appointed and shall serve under all the provisions herein governing the appointment, terms and duties of such board of directors for utilities. [Acts 1929, ch. 77, § 1, p. 252; 1931, ch. 67, § 1, p. 152.]

Compiler's Notes. By § 48-1201 and the 1960 federal census, Indianapolis was the only city of the first class.

Bracketed letter "s" in word "corporations" inserted by compiler.

Title of Act. The title of Acts 1929, ch. 77, reads: "An act supplemental to an act entitled 'An act concerning municipal corporations,' approved March 6, 1905." In force March 11, 1929.

Amendment. The 1931 amendment added "have as its head and" in the first paragraph; added "as originally constituted" in the second paragraph; added the third paragraph; substituted the first sentence of the fourth paragraph for "At the expiration of the respective terms of the members of the board of trustees appointed, the mayor shall appoint successors to membership on such board, such succeeding members to be nominated in the same method and by the same authorities as herein provided for nominating the first members of such board of trustees, and all such appointments shall be for a period of four years"; deleted from the fourth paragraph a provision as follows: "Notice in writing shall be given by the mayor to the judge of the circuit court entitled to submit nominations not more than 60 days and not less than 30 days before the date at which a new appointment should be made, and if within 25 days after the receipt of such notice, the authority in whom is vested the right to make nominations fails to transmit in writing to the mayor such nomination, the mayor shall thereupon choose such member on his own initiative"; added "the mailing to him of" and "vacate such office by becoming a nonresident of such city" in the second sentence of the fourth paragraph; substituted "shall thereby terminate and become vacant" for "shall end" at the end of the second sentence of the fifth paragraph; deleted "and no member of the board of directors for utilities shall be appointed by said board of trustees unless he receive the vote of a majority of all members of said board of trustees" from the seventh paragraph; deleted a provision following the seventh paragraph as follows: "It shall be the duty of said board of trustees for utilities to appoint the members of the board of directors for utilities"; added "for the purpose of transacting any business pertaining to their duties" and "of such board of trustees" in the twelfth paragraph; added the thirteenth paragraph; substituted "shall thereby terminate and become vacant" for "shall immediately end" at the end of the second sentence of the fourteenth paragraph; added the last three paragraphs; deleted a provision as follows: "If a vacancy occurs in said board of directors from any cause said board of trustees shall appoint a successor who shall serve for the balance of the term for which the member whose place is so filled was appointed"; and deleted a provision for removal of trustees or directors by mayor upon charges, with hearing and right of appeal to superior or circuit court.

Cross-Reference. Council may appropriate from any fund not to exceed five per cent of cost of addition to or purchase of utility, § 61-416.

Indiana Decimal Digest. See Municipal Corporations, 6116.

48-7102 [10988.2]. **Board of directors—Organization.**— Not later than thirty [30] days and after the first members of any such board of directors are appointed, and annually thereafter, the members of such board of directors for utilities shall hold a meeting for the purpose of organization. They shall choose one [1] of their members president, another vice-president, another secretary, and another treasurer, who shall perform the duties usually pertaining to those offices. Such officers first so chosen shall serve from the date of their election until one [1] year from the first day of January following their election, or until their successors are duly elected and qualified. Thereafter said board of directors at their annual meeting on the second Monday of January shall elect such officers for the ensuing year.

The members of such board of directors for utilities shall each be paid a salary for their services as such directors at the rate of six hundred dollars [$600] per annum during the period of service. A majority of the members of said board of directors shall constitute a quorum, and the concurrence of a majority of such membership shall be necessary to any action of such board. Such board of directors shall hold an annual meeting on the second Monday of January of each year, at the general offices of such board, and such other regular meetings at such times as it may determine, and upon such notice as it may fix, by rule or regulation. It shall be authorized to make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of the properties entrusted to its care. Such board of directors shall require any officer or employee having custody of funds to give bond in such reasonable amount as the board may prescribe, the expense of which bonds shall be paid by the department of public utilities of such city. [Acts 1929, ch. 77, § 2, p. 252.]

Compiler's Note. For present law concerning salaries, see § 48-1222.

48-7103 [10988.3]. **Board of directors—Jurisdiction—Duties and powers.**—The said board of directors for utilities shall have, within and outside such city as herein provided, the exclusive government, management, regulation and control of all public utilities consisting of any water-works, gas-works, electric light works, heating and power plants of any kind of character, telephone and other systems of communication, and local transportation systems of any kind operated upon, above, or below any street or territory within said city, or outside the city within the limits now or hereafter authorized by law, and all property held by and relating or belonging thereto, any of which public utilities any such city may heretofore have acquired, or may hereafter acquire, or construct, for the service of the public as consumers, users, or patrons, and including any public utility and all property thereof which such city may now or hereafter hold as trustee for the benefit of the inhabitants of such city; and such board of directors shall be charged with the duty of, and shall have all the necessary power to furnish and sell service and products of and to make all necessary construction, reconstruction, repairs, renewals, enlargements, extensions, or additions to any such plant or property of any such public utility so owned or at any time so held in trust, which in the judgment of said board of directors is desirable or necessary for the proper conduct of such business and the proper serving of the inhabitants of said city and adjacent, contiguous or suburban communities or territory within the county wherein such city is situated and served, or reasonably capable of being served, in any manner by or with respect to any such utility.

Said board of directors shall also have the power to lease any such utility property for a term not exceeding

thirty-five [35] years to any person, partnership, or corporation, and without the approval of the public service commission, such lease to be upon such terms and conditions as said board may deem to be to the best interest of such city, and the inhabitants thereof: Provided, however, That no such lease shall be valid or effective until it has been approved by said board of trustees and duly ratified and approved by an ordinance of the common council approved by the mayor of such city; which board and council must each vote such approval by a two-thirds vote of their total membership: And, provided, further, That in any such lease an option may be given to such lessee to extend the same for a period not to exceed ten [10] additional years.

SPECIAL POWERS

In connection with the duties devolving upon such board of directors in the government, management, regulation, control and operation of all such utilities, or any thereof, it shall have power as follows:

(1) To condemn, appropriate, lease, rent, purchase and hold any real estate, rights of way, materials or personal property within such city or within five [5] miles of the corporate limits thereof, needed for the proper giving of service by any such utility to the inhabitants of said city and the community contiguous thereto and served from any such utility plant.

(2) To design, order, contract for and construct any and all necessary or desirable extensions of or additions to any utility plant and property owned, or so held in trust, by said city, and to enter into all necessary contracts with reference thereto, and with reference to the purchase of materials and supplies needed for the operation of any such plant or plants, in accordance with such rules and regulations as may be adopted by such board

of directors, and without the necessity of advertising for bids, or without such other restrictions as are now imposed by any law of the state of Indiana with reference to the letting of contracts for work, material or supplies by municipal bodies or other governmental agencies.

(3) To sell any products or by-products, and enter into executory contracts for the sale thereof, to anyone whatsoever and without any restriction concerning the taking of bids therefor or otherwise.

(4) To operate any such plant or plants, to receive and collect all moneys due on account of such operation or otherwise relating to such plant or plants or business; and in connection therewith to employ such managers, superintendents, assistant managers, assistant superintendents, engineers, attorneys, auditors, clerks, foremen, and other employees, as may be necessary for the proper carrying on and operation of any such utility plant or plants, and the business thereof, and to fix the compensation of all such employees: Provided, however, That no contract of employment shall be made for a longer fixed period than four [4] years; but may be extended or renewed from time to time thereafter. Said directors shall have power to elect from their membership an executive committee consisting of not more than three [3], who may be assigned to the supervision of any one [1] or more of such utilities and who shall, in the intervals between the meetings of said directors, exercise all the powers and duties of said directors, all of their acts to be subject, however, to the approval of said directors, and to fix any such additional compensation to the members of said executive committee, in addition to their salaries as directors, as shall be reasonable. Said additional compensation shall be fixed by a resolution of said directors entered of record at the time of the appointment of said executive committee.

ADDITIONAL COMMITTEES

Whenever any such city shall acquire, hold, own, or so hold in trust for the inhabitants thereof, more than one [1] such public utility and the property thereof, such board of directors shall have power to select additional executive committees from their membership in the same manner and with the same power as the aforesaid executive committee first selected, which committee may be assigned by such board to any such utilities deemed necessary.

EMPLOYEES—SELECTION—MERIT SYSTEM

In the selection of employees, other than managers, superintendents, assistant managers, assistant superintendents, engineers, attorneys and auditors, the board of directors may provide for a merit system of employment to be determined by competitive examination, except as to unskilled and common laborers, in which political, religious, or other personal affiliations shall not be considered. In selecting managers the directors shall consider character, training and general expert and executive fitness and experience for the position in the particular utility to which such manager is to be assigned, as the necessary requirements for appointment.

SPECIAL POWERS CONTINUED

(5) To rent such offices, and other real estate and property for the conduct of the business of such utility or utilities as may be deemed needful, and enter into contracts with reference to the rental and use thereof: Provided, however, That no such contract shall be made for a longer period than ten [10] years.

(6) In the event there be any open mortgage upon any utility property acquired by any such city, either in absolute ownership or in trust, by the terms of which mort-

gage additional bonds may be taken down from the trustee under such mortgage to meet, in whole or in part, the cost of extensions and improvements to the mortgaged property, said board of directors shall have power and authority to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such property; to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such property.

(7) To take over, adopt and assume the performance of the provisions of any lease under which any utility property may be held at the time of the acquisition of any utility by any such city, either in absolute ownership or in trust, and to take any and all steps necessary to perform and fulfill the terms of any such lease, and to obtain and preserve the benefits therefrom; and in event there be any outstanding open mortgage upon the property covered by such lease so taken over under the provisions of which bonds may be withdrawn from the trustee under such mortgage for the purpose of paying all or part of the cost of additions to the property covered by such mortgage, to do and perform all things necessary in order to secure the benefit of such mortgage provisions and to enable the escrow bonds held by the trustee under any such mortgage to be taken down and sold in order to defray the cost of any extensions and betterments to such leased property; and to sell any such bonds so taken down for the purpose of assisting in defraying the costs of any such extensions or betterments to such leased property.

(8) To preserve the corporate organization of any company engaged in the mining of coal, or any other commercial or manufacturing business, the stock of which may

be owned by any utility whose property and assets may be taken over by any such city, either in absolute ownership or in trust; and in connection therewith to cause the stock of any such company to be issued in the name of said board of directors for utilities except as to qualifying shares for directors and to cause such qualifying shares to be issued in the names of such individuals as said board of directors may name; and thereupon to vote any such stock for the election of directors, who may be members of such board of trustees for utilities: Provided, however, That no member of such board of directors shall receive any compensation, directly or indirectly, as a director, officer or employee of any such company, other than the compensation herein provided as a member of the board of directors for utilities. Through the control thus given of any company, the board of directors for utilities shall be authorized to do all things necessary to cause any such coal mining company or other company efficiently to carry on its operations and to conduct its business in the same manner as if its stocks were owned by private individuals.

(9) To prescribe rules for service and rates for service in connection with the furnishing of any public utility service by said city to consumers, users, or patrons: Provided, That any such rules and rates for service shall be in full force and effect only after the same have been filed with and approved by the public service commission of Indiana, to the extent that such filing and approval are required under the laws of the state of Indiana.

(10) To take over all contracts and rights of any kind or character, and to fulfill and perform all obligations relating to the property and business of any utility company whose property may be taken over by any such city, either in absolute ownership or in trust.

(11) To make all rules, regulations and by-laws customary in private corporations, for their own conduct of

business, and necessary for the proper government and supervision of the utilities under their control: Provided, That any such rules, regulations and by-laws shall be subject to the approval of the board of trustees. [Acts 1929, ch. 77, § 3, p. 252; 1931, ch. 67, § 2, p. 152.]

Compiler's Note. For present law concerning salaries of city employees, see § 48-1222.

Amendment. Prior to the 1931 amendment the first paragraph read as follows: "The said board of directors for utilities shall have the exclusive government, management, regulation and control of any water-works, gas-works, electric light works, heating and power plants, and all property relating thereto, which any such city may heretofore have acquired or may hereafter acquire or construct for the service of the public as consumers, and such board of directors shall be charged with the duty of and shall have all necessary power to make all necessary repairs, renewals, enlargements, extensions or additions to any such plant or property which in the judgment of said board of directors is desirable or necessary for the proper serving of the inhabitants of said city and the adjacent community served with respect to any such utility from any such plant or plants." The 1931 amendment changed the first paragraph to its present form; added the second paragraph; substituted "in the government, management, regulation, control and operation of all such utilities, or any thereof," for "as aforesaid," in the first sentence of the third paragraph added "or so held in trust," in clause 2; added "to anyone whatsoever" in clause 3; deleted "except in so far as relates to the sale to the public of a public utility service and to the necessity of submitting the rates to be charged for such service to the public service commission of the State of Indiana" at the end of clause 3; added "but may be extended or renewed from time to time thereafter" at the end of the first sentence of clause 4; added "who may be assigned to the supervision of any one or more of such utilities" in the second sentence of clause 4; added the second and third paragraphs of clause 4; added "and other real estate and property" and "and use" in clause 5; added "either in absolute ownership or in trust" in clauses 6, 7, 8, and 10; deleted "subject to the approval of the public service commission of Indiana" immediately following the semicolon in clause 6 and the last semicolon in clause 7; added "users, or patrons" in clause 9; and added clause 11.

Cross-Reference. Public service commission, tit. 54.

Opinions of Attorney-General. The Citizens Gas and Coke Utility is an instrumentality of the City of Indianapolis, and as such is entitled to obtain free plates for motor vehicles owned by the city and used in the transaction of official business. 1958, No. 6, p. 25.

48-7104 [10988.4]. **Trustees' and directors' interest in contracts.**—No contract shall be made for the purchase or sale of any materials or supplies on behalf of said board of directors for utilities with any trustee or director, and no trustee nor director shall have any pecuniary interest in any such contract. [Acts 1929, ch. 77, § 4, p. 252.]

48-7105 [10988.5]. **Board of directors—Right of action.** —The board of directors for utilities in every such city may, in the name of the city, bring any such action which it deems proper in order to protect the property rights of said city with reference to any such utility property so under the control of such board, or to secure the more effective carrying out of the purposes of this act with reference to the erection, maintenance and operation of any such utility property or properties. [Acts 1929, ch. 77, § 5, p. 252.]

48-7106 [10988.6]. **Utility district.**—Upon the taking effect of this act and the organization of such board of directors for utilities, as hereinbefore provided, all of the territory included within the corporate limits of any said city shall become and constitute a utility district for the purpose of providing for the furnishing of utility service in such lines of utility operation as may be taken over or owned by said city, and thereafter said utility district shall be deemed duly created and established under and pursuant to the provisions of this act. [Acts 1929, ch. 77, § 6, p. 252.]

48-7107 [10988.7]. **Preliminary expenses — Payment.** — All preliminary expenses actually incurred by such board of directors in providing necessary records, the employment of clerks, engineers, attorneys and other employees, the making of surveys, and all other expenses of whatsoever nature necessary to be paid prior to the actual taking over and operation of any utility plant and the collection of revenues therefrom, shall be met and paid in the fol-

lowing manner: Said board of directors for utilities shall from time to time certify such items of expense to the controller of such city, directing him to pay the several amounts thereof, and thereupon said controller shall at once draw his warrant or warrants upon the city treasurer, which warrant or warrants shall be paid out of the general funds of such city not theretofore appropriated, without a special appropriation being made therefor by the common council; or in case there are no such general funds of said city not otherwise appropriated, the city controller shall recommend to the common council the temporary transfer of other funds of such city as is necessary to meet such items of expense, or the making of a temporary loan for such purpose, and such common council shall thereupon at once make such transfer of funds or authorize such temporary loan in the same manner that other temporary loans are made by such city: Provided, however, That the fund or funds of such city from which such payments are made shall be fully reimbursed and repaid with six per cent [6%] interest by such board of directors for utilities out of the first receipts from the operation of any such utility by said board which are not needed to defray current operating expenses and the expenses of imperative betterments. [Acts 1929, ch. 77, § 7, p. 252.]

48-7108 [10988.8]. **Bonds of utility district—Certificates of indebtedness.**—For the purpose of raising money to pay for the acquisition of any utility property which said city shall have the right to and shall determine to acquire, or which any such city make take over as trustee for the inhabitants thereof, including any money required to be paid for the purpose of redeeming or extinguishing the capital stock of any utility whose property may be so taken over and for the purpose of paying any outstanding obligations of any utility company subject to which the property of any such utility may be taken over by any such city, or held by it in trust for the inhabitants thereof;

or for the purpose of making necessary betterments, improvements, extensions or additions to any utility property owned, or so held in trust, by said city, the board of directors for utilities shall cause to be issued in the name of said city the bonds of said utility district not to exceed in amount the total cost of any such utility so purchased, or so held in trust, and for the outstanding obligations of any utility subject to which the property is to be taken over and which it is desired to pay off and discharge and/or of any such additions, betterments, improvements, extensions or additions to any utility owned, or so held in trust, and including all expenses necessarily incurred in connection with the acquisition of any such property, the paying off of any such indebtedness or the making of any such improvements, extensions or additions thereto. Such bonds shall be issued in any denominations not more than one thousand dollars [$1,000] each, and shall be payable at such period not longer than thirty [30] years after date, and in such series or series as such board of directors may by resolution determine. Said bonds shall be negotiable as inland bills of exchange, and shall bear interest at a rate not exceeding six per cent [6%] per annum, payable semiannually. On adopting a resolution ordering said bonds, said board of directors shall certify a copy of the same to the city controller of said city, who shall thereupon prepare said bonds and the same shall be executed by the mayor of said city and attested by the city controllers. Such bonds shall be exempt from taxation for any and all purposes. All of said bonds so issued by the board of directors shall be sold by the city controller to the highest bidder therefor, but in no event for less than par, after giving notice of sale of such bonds by publication in two [2] newspapers of the largest general circulation printed and published in the city where said bonds are sold, which publication shall be made not less than fifteen [15] days prior to the date fixed for the sale of said bonds. Any

bonds issued pursuant to the provisions of this act, whether bonds of said utility district, or mortgage bonds, certificates of indebtedness, or other obligations, as hereinafter provided for in this act shall be valid and binding without obtaining the approval of the public service commission of Indiana or the state board of tax commissioners of the state of Indiana. It shall be unlawful for said board of directors for utilities to cause to be issued under this act any bonds of said utility district payable by special taxation when the total issue for that purpose, including the bonds already issued and outstanding and those proposed to be issued, is in excess of two per cent [2%] of the total assessed valuation (after deducting all mortgage exemptions) of the property within said utility district, and all bonds or obligations issued in violation of this provision shall be void. Said bonds shall not in any respect be a corporate obligation or indebtedness of said city, but shall be and constitute an indebtedness of said utility district as a special taxing district, and said bonds and interest thereon shall be payable out of a special tax levy upon all of the property of said utility district, or from surplus earnings as in this act provided; and said bonds shall recite such terms upon their face, together with the purpose for which they are issued. No suit to question the validity of said bonds so issued for said utility district or to prevent their issue and sale shall be instituted after the date set for the sale of said bonds, and all said bonds from and after said date shall be incontestable for any cause whatsoever.

PROCEEDS OF BONDS—PAYMENT TO UTILITY COMPANY

In event any such city shall, pursuant to any contract so to do, determine to take over the property and business of any utility company by the payment to it of the amount necessary to pay off the stock of such company,

the proceeds of any such utility district bonds issued and sold as herein provided may, so far as is necessary, be paid over to any such utility company at the time of the conveyance, transfer, or taking over of its property, for the purpose of enabling such company to discharge its obligations to its stockholders in accordance with the provisions of any such contract.

TEMPORARY LOANS—MORTGAGE BONDS

In addition to the authority granted to issue utility district bonds the board of directors of any such utility district for the purpose of providing necessary funds with which to pay the cost of acquiring any utility property, or paying off any existing indebtedness of or upon any utility property, so acquired, or to pay the expenses of operation of any such utility property, including the cost of any betterments or extensions, may make temporary loans in the form of certificates of indebtedness, which shall be a charge solely against either the particular utility property or against the earnings thereof, or both, on behalf of which the same is borrowed; or said board of directors may authorize the issuance of mortgage bonds secured by a mortgage upon the property or upon the earnings, or both, of the particular utility for whose benefit such moneys are borrowed; and any such certificates of indebtedness and mortgages shall constitute charges as may be indicated aforesaid by the directors when authorizing the same and shall contain such terms and provisions and shall be sold at such price and shall bear such rate of interest as such board of directors may approve.

Such mortgage indebtedness shall not constitute a general obligation of such city, or of such utility district, but the holders thereof shall be entitled to look solely to the mortgaged property and the revenues derived from the operation thereof for the repayment of such indebtedness.

All such certificates of indebtedness and mortgage bonds shall be signed by the mayor of such city and attested by the city controller, and shall on their face show the purpose for which they are issued and the character of the obligation created thereby. All such certificates of indebtedness and mortgaged bonds, or either thereof, shall be exempt from all taxation. [Acts 1929, ch. 77, § 8, p. 252; 1931, ch. 67, § 3, p. 152.]

Amendment. The 1931 amendment added "or held by it in trust for the inhabitants thereof" and "or so held in trust" in the first sentence; added "whether bonds of said utility district, or mortgage bonds, certificates of indebtedness, or other obligations, as hereinafter provided for in this act" in the seventh sentence; substituted "two per cent" for "one per cent" in the eighth sentence; and added the last three paragraphs.

Cross-References. General bonds of city for special district purposes, §§ 48-517, 48-518.

Public service commission, tit. 54.

Sale of bonds, procedure, §§ 61-413–61-419.

State board of tax commissioners, § 64-1601 et seq.

Approval by State Tax Board.

Section 64-1332, requiring approval by the state tax board of bonds and other evidences of indebtedness where the rate of interest exceeds five per cent, is mandatory and any such issue not so approved is absolutely void. Citizens' Bank v. Burnettsville (1932), 98 App. 92, 179 N. E. 724.

48-7109 [10988.9]. **Bonds—Disposition and use of proceeds.**—All proceeds from the sale of said bonds under and pursuant to section eight [§ 48-7108] of this act shall be kept as a separate and specific fund to pay the cost of the acquisition of any utility property which said city shall have the right to and shall determine to acquire or the payment of obligations of any such utility subject to which its property is purchased, or the cost of making necessary betterments, improvements, extensions or additions to any utility property owned by said city, as hereinabove provided, and no part of the same shall be used for any other

purpose whatsoever. Such funds shall be deposited at interest with the depositary or depositaries of other public funds of such city, and all interest collected therefrom shall belong to such fund. Any surplus of funds remaining out of the proceeds of said bonds after all of said costs and expenses are fully paid shall be paid into and become a part of the utility district bond fund as hereinbefore referred to. [Acts 1929, ch. 77, § 9, p. 252.]

48-7110 [10988.10]. **Bonds—Tax levy.**—For the purpose of raising money to pay all bonds issued as provided in section eight [§ 48-7108], and the interest thereon, to the extent that moneys are not available therefor in the judgment of the board of directors for utilities from the operations of said utility plant or plants so owned by said city, the board of directors for utilities, as an official board of said utility district, is hereby empowered to levy, and shall levy each year, a special tax upon all the property of said utility district in such manner as to meet and pay the principal of said bonds as they severally mature, together with all accruing interest thereon. Said board of directors shall cause said tax so levied each year to be certified to the city controller of said city and the auditor of the county in which said utility district is located, on or before the first day of October of each year. Such tax so levied and certified shall be estimated and entered upon the tax duplicate by the auditor, and shall be collected and enforced by the county treasurer in the same manner as state and county taxes are now estimated, entered, collected and enforced; and as such tax is so collected by the county treasurer, it shall be accumulated and kept in a separate fund to be known as the "Utility District Bond Fund", and shall be applied to the payment of the aforesaid utility district bonds and interest as they severally mature, and for no other purpose whatsoever: Provided, That all accumulations of said fund prior to their use for the payment of such bonds and interest shall be deposited, at interest,

with the depositary or depositaries of other public funds in such city, and all interest collected thereon shall belong to such fund. [Acts 1929, ch. 77, § 10, p. 252.]

48-7111 [10988.11]. **Bonds—Application of surplus earnings.**—Within sixty [60] days after the end of each calendar year, if there be at any time any bonds outstanding issued on account of said utility district, payable in whole or in part through a tax levy against the property in said utility district, said board of directors for utilities shall cause any surplus earnings arising from the operation of any such utility property, which are not pledged to secure the payment of any obligation of, or on account of said utility district, and which are not, in the opinion of such board of directors, necessary to provide against possible unfavorable results from operation, or to provide for contemplated betterments, extensions, improvements, or additions, to be paid over to the county treasurer, ex officio city treasurer, and to be added to and become a part of said utility district bond fund, and to be used for the same purposes and in the same manner as funds derived from levy of taxes, as in this act hereinbefore provided. In event there are no such utility district bonds at the time outstanding, any such surplus operating revenues not needed for the purposes aforesaid shall be paid over to and become a part of the general funds of such city. [Acts 1929, ch. 77, § 11, p. 252; 1931, ch. 67, § 4, p. 152.]

Amendment. Prior to the 1931 amendment the first sentence of this section down to "to provide against possible unfavorable results" read as follows: "Within 60 days after the end of each calendar year, if there be at the time any bonds outstanding issued on account of said utility district, said board of directors for utilities shall cause any surplus earnings from the operation of any such utility or utilities during the preceding calendar year, which are not necessary to provide for current operating expenses and such reserve funds as may be necessary in the opinion of such board of directors." The 1931 amendment changed the sentence to its present form and deleted a paragraph which read: "Said board of directors may

secure temporary loans for a period not exceeding ninety (90) days and at rates of interest not exceeding six per cent for the use of said utility district whenever in the judgment of said board a necessity exists therefor in conducting the business of said district, providing a resolution declaring such necessity is first adopted and recorded upon the records of said board, and said board is authorized to execute notes or other evidence of indebtedness which shall bind said utility district to the repayment thereof."

48-7112 [10988.12]. **Current receipts—Disposition—Expenditures.**—The current receipts and all other moneys derived from the operation of any such utility property shall be expended by said board of directors upon vouchers in a form to be determined by them, and any such funds shall be deposited in such bank or banks as may be determined by said board to the credit of said board of directors for utilities, and any interest earned on any such deposits shall be added to the principal thereof. No appropriation in any form shall be necessary for the expenditure of any of such current income or for the expenditure of the proceeds of any sale of bonds, or of any other obligations, as hereinbefore authorized, but all funds arising under the provisions hereof shall be deemed appropriated for the respective purposes herein named and shall be under the control of the board of directors for utilities as herein provided, and said board of directors shall have full, complete and exclusive authority to expend such funds for the purposes herein provided. [Acts 1929, ch. 77, § 12, p. 252; 1931, ch. 67, § 5, p. 152.]

Amendment. The 1931 amendment added "or of any other obligations" in the second sentence.

48-7113 [10988.13]. **Utility records.**—In event more than one [1] utility property is operated by said board of directors, separate books of account and records shall be kept for each utility, and the funds of each shall be kept segregated. [Acts 1929, ch. 77, § 13, p. 252.]

48-7114 [10988.14]. **Current reports.**—The board of directors for utilities shall make quarterly accounting and

reports to the city controller of such city, of all funds received and expended by it, and not less than sixty [60] days after the end of each calendar year the city controller shall make publication in not less than two [2] newspapers of general circulation printed and published within said city of the material facts as set forth in the report of said board of directors for the preceding calendar year. [Acts 1929, ch. 77, § 14, p. 252.]

Compiler's Note. Section 15 of Acts 1929, ch. 77 (Burns' Stat. Supp. 1929, § 10988.15) was repealed by Acts 1963, ch. 96, § 11.

48-7115 [10988.16]. **Board of directors free from control of state board of tax commissioners—Liberal construction—Provisions severable.**—This act being necessary for and intended to secure efficient and economical management and operation of utility properties in any city of the first class taking advantage of the provisions hereof, the said board of directors shall have full power to transact all the business pertaining to said management and operation of each and all such utilities, including the issuance of bonds, mortgages, and other forms of indebtedness, free from all control and supervision of the state board of tax commissioners of Indiana. This act shall be liberally construed to effectuate the purpose hereof, and if any one [1] or more sections, clauses, phrases, or parts thereof, of this act shall be held invalid, the remaining sections, clauses, phrases, or parts thereof, shall not be affected thereby, and the legislature declares that it would have enacted all other parts of said act even if any or all of the aforesaid portions thereof had not been included therein. [Acts 1929, ch. 77, § 16, p. 252; 1931, ch. 67, § 6, p. 152.]

Amendment. The 1931 amendment added the first sentence and made changes in the wording of the second sentence.

48-7116 [10988.17]. **Budget Law inapplicable.**—The provisions of chapter 95 of the Acts of 1927 [§ 64-1331] of the General Assembly of Indiana, commonly known as the

Budget Law, shall not apply to the board of directors created by this act but such board of directors shall annually on or before the thirty-first day of December, furnish to the city controller an estimate of the moneys to be expended by them for the succeeding calendar year. [Acts 1929, ch. 77, § 17, p. 252.]

48-7117 [10988.18]. **Books, accounts, records, transactions.**—The books, accounts, records and transactions of said utility district and of the board of directors thereof shall be subject to examination, audit and supervision by the state board of accounts to the same extent as the books, accounts, records and transactions of other municipal governments or officers or departments of municipal governments are subject thereto. [Acts 1929, ch. 77, § 18, p. 252.]

Repeal. Section 19 of Acts 1929, ch. 77 repealed all laws and parts of laws in conflict.

Emergency. Section 20 of Acts 1929, ch. 77 declared an emergency. Approved March 11, 1929.

Cross-Reference. State board of accounts, § 60-201 et seq.

48-7118. Application of act.—Whenever in any sections of such above entitled act any provisions are made applying or relating to any public utility or utility property owned, held, or acquired by said city, all such provisions shall apply and relate also to any public utility and utility property which said city may either now or hereafter hold, possess, be entitled to, or in any manner acquire in trust for the use and benefit of the inhabitants thereof. [Acts 1929, ch. 77, § 21, as added by Acts 1931, ch. 67, § 7, p. 152.]

Emergency. Section 8 of Acts 1931, ch. 67 declared an emergency. Approved March 6, 1931.

48-7119. Bonds—Payment—Plant revenue—Recitals in bonds—Maturity—Interest—Procedure—Validity—Sale—Notice of—Proceeds of sale—Mortgage to secure.—For the purpose of obtaining funds with which to pay for the

acquisition of any utility property which any such city shall have acquired or shall have the right to and shall determine to acquire, or which any such city may have taken over as trustee for the inhabitants thereof or may take over as trustee for the inhabitants thereof, including any money required to be paid for the purpose of redeeming or extinguishing the capital stock of any utility whose property has been or may be so taken over and for the purpose of paying any outstanding obligations of any utility subject to which the property of any such utility has been or may be taken over by any such city, or is or may be held in trust for the inhabitants thereof, or for the purpose of making necessary betterments, improvements, extensions or additions to any utility property that is or may be owned or is or may be so held in trust by any such city, including all expenses necessarily incurred in connection with the acquisition of any such property or taking it over in trust or the paying off of any such indebtedness or the making of any such improvements, extensions, or additions thereto, any such city by its board of directors for utilities shall have power to cause to be issued in the name of such city, bonds which are to be paid solely and exclusively from the income and revenues of such utility property and not otherwise, and shall not in any respect be a corporate obligation or indebtedness of such city nor of such utility district as a special taxing district; and such bonds shall recite such terms upon their face, together with a statement of the purpose for which they are issued; and they shall be signed by the mayor of such city and attested by the city controller. Such bonds shall be issued in any denominations not more than one thousand dollars [$1,000] each, and shall be payable at such period not longer than fifty [50] years after date, and in such series as such board of directors may by resolution determine. Such bonds shall have the qualities of negotiable instruments in the hands of good-faith hold-

ers. Such bonds shall bear interest at a rate not exceeding six per cent [6%] per annum payable semiannually. Such bonds shall be exempt from taxation as to principal and income. They shall be valid without the necessity of any approval of or ratification by either the public service commission of Indiana or the state board of tax commissioners of Indiana. The board of directors, upon adopting a resolution ordering such bonds, shall certify a copy thereof to the city controller of such city, who shall thereupon prepare said bonds, and the same shall be executed by the mayor of said city and attested by its city controller. All of the bonds so issued shall be offered for sale and sold by the city controller to the highest bidder therefor, but in no event for less than par, after giving notice of sale of such bonds by publication in two [2] newspapers of the largest general circulation printed and published in the city where said bonds are sold, which publication shall be made not less than fifteen [15] days prior to the date fixed for the sale of such bonds. No suit to question the validity of any bonds so issued or to prevent their issuance or sale shall be instituted after the date fixed for the sale of such bonds and all such bonds from and after such date shall be incontestable, except for fraud, forgery, or violation of constitutional provisions. In the event any such city shall, pursuant to any contract right so to do, have determined, or determine, to take over the property and business of any utility company by the payment to it of the amount necessary to pay off the stock of such company, the proceeds of any such bonds issued and sold hereunder may, to the extent necessary, be paid over to such utility company at the time of the conveyance, transfer, or taking over of its property, for the purpose of enabling such company to discharge its obligation to its stockholders in accordance with the provisions of any such contract. In addition to the authority herein granted such board of directors may in its discretion secure the

payment of such bonds by mortgage upon the property of the particular utility for whose benefit the proceeds of such bonds are to be used; so that such bonds may be secured, in the discretion of such board of directors, either by a charge against the earnings of such utility property, or against such property itself, or both; and the bonds shall state upon their face the character of the obligations created thereby.

Provided, however, That such board of directors may in its discretion cause such bonds to be offered for sale and sold at a discount of not to exceed five per cent [5%] and bearing interest at a rate not to exceed five and one-half per cent [5½%], with the right to reject any and all bids, but provided always that the interest cost to the city for the money received from the sale of such bonds shall not exceed five and one-half per cent [5½%] per annum: And, provided further, That such bonds may be offered for sale and sold to the United States or to any corporation owned or controlled by the United States without notice by publication.

Provided, also, That in the discretion of such board of directors, such bonds or any of them may be issued as registered bonds; and bearer bonds may be registered as to principal in the holder's name on the books of the city, any such registration being noted on the bonds by the city controller or other designated officer. No transfer of a registered bond shall be valid unless made on the books of the city by the registered holder and similarly noted on the bond. Any bond so registered as to principal may be discharged from such registration by appropriate notation on the books of the city at the request of the registered holder, after which such bond shall be transferable by delivery but may again be registered as to principal as before. The registration of bonds as to the principal shall not restrain the negotiability of the coupons by delivery

merely. [Acts 1929, ch. 77, § 22, as added by Acts, 1933, ch. 125, § 1, p. 737; 1935, ch. 311, § 1, p. 1499.]

Amendment. The 1935 amendment added the last two paragraphs.

Emergencies. Section 2 of Acts 1933, ch. 125 declared an emergency. Approved March 7, 1933.

Section 2 of Acts 1935, ch. 311 declared an emergency. Approved March 13, 1935.

Cross-References. Sale of bonds, procedure, §§ 61-413–61-419.

See note, § 48-7108. Citizens' Bank v. Burnettsville (1932), 98 App. 92, 179 N. E. 724.

48-7120. Purchase of public utilities.—Any city of the first class shall have the power to purchase the whole or any part of the property of a public utility, when but only when, its common council by an ordinance signed and approved by the mayor, and its board of trustees for utilities of its department of utilities by a resolution, have each determined and declared it expedient so to do; which officials are hereby duly empowered so to do; in which event such city may acquire such property, notwithstanding a portion of it may be located anywhere outside of the corporate limits of such city, for the price and upon the terms and conditions stated in such ordinance and resolution, but not otherwise. The power hereby conferred shall include the power to purchase the capital stock of the corporation owning such property, or sufficient of such stock to enable such city to cause the liquidation of such corporation, payment of its debts, and vesting of title to its remaining property in such city; and in the event of purchase of such stock, such city, by its board of directors for utilities of its department of utilities, is empowered to vote such stock so as to cause the liquidation of such corporation, the payment of its debts, and the vesting of title to its remaining property in the city. Funds with which to pay such purchase-price may be obtained from the sale of revenue bonds issued and sold under the authority of

an act entitled "An act supplemental to an act entitled 'An act concerning municipal corporations,' approved March 6, 1905," approved March 11, 1929 [§§ 48-7101—48-7119], and all acts amendatory thereof and supplemental thereto, including chapter 311 of the Acts of 1935, or under any other act relevant thereto. [Acts 1939, ch. 107, § 1, p. 540.]

Title of Act. The title of Acts 1939, ch. 107, reads: "An act concerning the purchase and consequent operation of utility properties by cities of the first class; repealing all acts and parts of acts in conflict therewith; and declaring an emergency." In force March 9, 1939.

48-7121. Operation of public utilities.—When any city of the first class shall have thus acquired utility property, the control and operation of such utility property shall be in the board of directors for utilities of the department of utilities of such city under and pursuant to an act entitled "An act supplemental to an act entitled 'An act concerning municipal corporations,' approved March 6, 1905," approved March 11, 1929 [§§ 48-7101—48-7119], and all acts amendatory thereof and supplemental thereto; or under any subsequent acts relating to such matters; subject, however to all valid terms and conditions upon which such utility property shall have been so purchased. [Acts 1939, ch. 107, § 2, p. 540.]

48-7122. Services furnished city—Payment.—Such city shall not be obligated to pay for any utility service furnished it by the operation of utility property acquired under this act except according to and by virtue of such agreement, if any, as may be made therefor between the board of directors for utilities of the department of utilities of such city, on the one part, and said city by its mayor, city controller, and board of public works and sanitation, on the other part. [Acts 1939, ch. 107, § 3, p. 540.]

Repeal. Section 4 of Acts 1939, ch. 107 repealed all acts and parts of acts in conflict.

Emergency. Section 5 of Acts 1939, ch. 107 declared an emergency. Approved March 9, 1939.

48-7123. Property tax on city-owned utilities.—On and after the effective date of this act, all real property and personal property of every utility owned or held in trust by every city of the first class shall be taxed in the same manner and upon the same basis as though said utility were a public utility and privately owned. [Acts 1963 (Spec. Sess.), ch. 5, § 1, p. 5.]

Title of Act. The title of Acts 1963 (Spec. Sess.), ch. 5, reads: "An act to tax the real and personal property of utilities owned or held in trust by cities of the first class." In force, April 2, 1963.

Effective Date. Section 2 of Acts 1963 (Spec. Sess.), provided that this act shall be effective beginning with taxes payable in the year 1964.

Emergency. Section 3 of Acts 1963 (Spec. Sess.), declared an emergency. Approved April 2, 1963.